STATE OF MICHIGAN
IN THE COURT OF APPEALS

GARY AND KATHY HENRY, et al.,

Plaintiffs-Appellees,

v.

THE DOW CHEMICAL COMPANY,

Defendant-Appellant.
_______________________________/

Court of Appeals No. 266433

Saginaw County Circuit Court
No. 03-47775-NZ

Hon. Leopold P. Borrello

BRIEF OF THE DEFENSE RESEARCH INSTITUTE, MICHIGAN DEFENSE TRIAL COUNSEL, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, AMERICAN CHEMISTRY COUNCIL, AND NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLANT

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STATEMENT OF THE QUESTIONS PRESENTED

I.

SHOULD THIS COURT REVERSE THE TRIAL COURT'S MANIFESTLY ERRONEOUS ORDER CERTIFYING A CLASS UNDER MCR 3.501 TO PURSUE MASS TORT PROPERTY DAMAGE CLAIMS IN WHICH INDIVIDUAL ISSUES OF FACT AND LAW PREDOMINATE OVER ANY ISSUES THAT CAN BE PROVEN ON A CLASSWIDE BASIS AND WHICH DEMONSTRATE THE PREREQUISITE FACTORS TO MAINTAIN A CLASS ACTION ARE NOT SATISFIED?

Defendant-Appellant, The Dow Chemical Company, answers "Yes."

Plaintiffs presumably will answer "No."

The Saginaw County Circuit Court would presumably answer "No."

Amici curiae answer "Yes."

II.

SHOULD THIS COURT REVERSE THE TRIAL COURT'S ORDER CERTIFYING A CLASS PURSUANT TO MCR 3.501 WHERE THE DEFINITION IS VAGUE, INTERNALLY CONTRADICTORY AND DOES NOT IDENTIFY AN ASCERTAINABLE CLASS?

Defendant-Appellant, The Dow Chemical Company, answers "Yes."

Plaintiffs presumably will answer "No."

The Saginaw County Circuit Court would presumably answer "No."

Amici curiae answer "Yes."

III.

SHOULD THIS COURT REJECT PLAINTIFFS' NOVEL APPROACH TO CLASS CERTIFICATION BASED ON THE LOWEST COMMON DENOMINATOR CONCLUSION?

Defendant-Appellant, The Dow Chemical Company, answers "Yes."

Plaintiffs presumably will answer "No."

The Saginaw County Circuit Court would presumably answer "No."

Amici curiae answer "Yes."

STATEMENT OF INTEREST

The Defense Research Institute ("DRI") is an organization with more than 21,000 individual lawyer and 400 corporate members throughout the United States. It seeks to advance the cause of civil justice in America by ensuring that issues of importance to the defense bar, to its clients, and to the preservation and enhancement of the judicial process are properly and adequately addressed. These objectives are accomplished through publishing scholarly material, educating the bar by conducting seminars on specialized areas of law, testifying before Congress and state legislatures on select legislation impacting the civil justice system, and participating as amicus curiae on issues of importance to the defense bar and its clients. DRI provides a forum for the networking of state and local defense organizations who share a concern for the proper and efficient operation of the civil justice system.

The Michigan Defense Trial Counsel ("MDTC") is an organization consisting primarily of civil defense attorneys in the State of Michigan. The MDTC has as one of its organizational goals to support improvements in the adversary system of jurisprudence and the operation of the courts. The MDTC serves its membership through programs of continuing education. It serves the defense bar by appearing as amicus curiae in cases such as this.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the Chamber has filed more than 1,000 amicus curiae briefs in federal and state courts.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and

professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed amicus curiae briefs in cases before federal and state courts that have addressed important liability issues.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care(r), common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $520 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

STATEMENT OF FACTS

Amici adopt by reference the Statement of Facts and Proceedings Below of Defendant-Appellant.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The questions presented go to the very heart of the protections afforded putative class members and defendants when a court determines whether to certify a class action: the level of scrutiny a trial judge must give to determining whether the case warrants class treatment. For the purpose of class certification, should judges merely accept statements in a plaintiff's pleading, or conduct an independent analysis of this important issue? Federal and state courts alike have ruled that a "rigorous analysis" or similar meaningful review of the suitability of class certification is required. This requirement recognizes that inappropriate class certification implicates constitutional due process rights and places undue practical burdens on class members and defendants. Close consideration of class certification requests also helps assure that class treatment is granted only where it is truly appropriate and will further the goals of full, fair and efficient resolution of claims.

The superficial standard used by the trial court in this case harkens back to the days of "drive by" class certifications, where some state trial courts routinely granted class action treatment without any meaningful evaluation of the class action factors, sometimes on the same day the complaints were filed. The error is particularly egregious where, as here, there was a sizeable record demonstrating that individualized issues of fact predominate, yet that record is not considered by the court. This laissez-faire approach to class certification had a number of adverse impacts on class members and defendants, ranging from reducing individual class members' recoveries while increasing class counsel's fees to forcing defendants into "blackmail settlements" of questionable claims. Moreover, it fuels forum shopping from federal to state

courts. In 2005, Congress enacted legislation to curb abuses in certain interstate class actions, but, properly, not in primarily state-focused class actions. As a result, plaintiffs' lawyers are likely to seek out class-action friendly state courts in order to avoid the reach of the federal law.

The circuit court's decision in this case to adopt a superficial class certification standard is simply an invitation to recreate these class action mills in Michigan courts. If this ruling is upheld, then class action filings against Michigan-based businesses and industries will increase dramatically, regardless of the merits of the claims or the propriety of class treatment. The attendant adverse effects will hurt consumers of products and services, the state's economy and workforce, and participants in the state's civil justice system. Such a ruling also will stand as persuasive precedent for those in other states seeking to undermine the protections that a more rigorous standard provides to litigants.

As a result, *Amici Curiae* respectfully ask the Court to reverse the trial court's order granting class certification dated October 21, 2005, and to emphasize that Michigan follows the "rigorous analysis" standard set by the Supreme Court of the United States to be used in class certification decisions.

ARGUMENT

Class certification should not be treated as a matter of routine, with a cursory review of the allegations in a complaint and an order devoid of any meaningful analysis of the class action factors applied to the record in the case. Class treatment is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *General Telephone Co of SW v Falcon*, 457 US 147, 155 (1982) (quoting *Califano v Yamasaki*, 442 US 682, 700-701 (1979)). As such, "careful attention" to the requirements of class certification rules is "indispensable." *E Tex Motor Freight System, Inc v Rodriguez*, 431 US 395, 405 (1977).

The Supreme Court of the United States has emphasized that courts are required to conduct a "rigorous analysis" of the class action prerequisites before certifying a class. *Falcon*, 457 US at 161. This analysis is more akin to a "diamond cutter" than a "cookie cutter" approach—it requires a laser-sharp individualized examination of the issues.

Many state courts adopted the federal class action rule when they created their own class action procedures and have decided to follow federal precedent when making their own class certification decisions. See *Zine v Chrysler Corp*, 236 Mich App 261, 288 n 12; 600 NW2d 384, 400 n 12 (1999) ("There being little Michigan case law construing MCR 3.501, it is appropriate to consider federal cases construing the similar federal court rule ... for guidance."); S Rep 109-14, at 13 (2005) (stating that 36 states adopted the basic federal class action rule, some with minor revisions, and most of the rest adopted federal court class action policy and contain similar requirements); see, e.g., *Hefty v All Other Members of the Certified Settlement Class*, 680 NE2d 843, 848 (Ind, 1997); *Getto v Chicago*, 426 NE2d 844, 848 (Ill, 1981).

State courts have adopted the "rigorous analysis" standard for the certification of class actions under state rules. For example, in Ohio, a trial court "is required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of

[Ohio] Civ. R. 23 have been satisfied." *Hamilton v Ohio Savings Bank*, 694 NE2d 442, 447 (Ohio, 1998); see *Creveling v Gov't Employees Ins Co*, 828 A2d 229, 238-239 (Md, 2003) ("A trial court must conduct a 'rigorous analysis' of these prerequisites before certifying a class" under Rule 23 of the Maryland Rules of Civil Procedure); *SW Refining Co, Inc, v Bernal*, 22 SW3d 425, 435 (Tex, 2000) (adopting "rigorous analysis" standard and recognizing that "[a]ggregating claims can dramatically alter substantive tort jurisprudence...by removing individual considerations from the adversarial process," thus magnifying and strengthening the number of unmeritorious claims"); *Baptist Hospital of Miami, Inc v Demario*, 661 So 2d 319, 321 (Fla Dist Ct App, 1995) (requiring "rigorous analysis" of class certification factors and stating that certification of a class "considerably expands the dimensions of the lawsuit, and commits the Court and the parties to much additional labor over and above that entailed in an ordinary private suit"); accord *Chemtall, Inc v Madden*, 607 SE2d 772, 783 (W Va, 2004) ("a class action may only be certified if the trial court is satisfied, after a thorough analysis, that the prerequisites of Rule 23(a) of the West Virginia Rules of Civil Procedure have been satisfied. Further, the class certification order should be detailed and specific in showing the rule basis for the certification and the relevant facts supporting the legal conclusions.").

This approach makes both legal and common sense. Rulings by federal courts experienced with the benefits and drawbacks of class certification can provide guidance on the issues. As a policy matter, it makes sense for federal and state courts to use similar standards in certifying class actions to avoid systematic abuses and rampant forum shopping.

Indeed, this Court recently adopted the "rigorous analysis" standard in an unpublished case. *Jackson v Wal-Mart Stores, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2005 (Docket No. 258498); 2005 WL 3191394, *2. The *Jackson* Court upheld a trial court's denial of class certification in a case arising out of plaintiffs' employment.

The Court stated that while a trial court must accept as true the allegations made in the complaint in support of certification, "[t]his does not, however, require that the trial court "blindly rely on conclusory allegations" that merely "parrot" the requirements for class certification." *Id.* at *2 (quoting 3 Newberg & Conte, Newberg on Class Actions, (4th ed), § 7.26, p 81). This Court wrote:

> To the contrary, class certification should be granted only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of [class certification] have been satisfied." Because "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,'" such analysis may, and often does, require that the court "probe behind the pleadings" and analyze the claims, defenses, relevant facts, and applicable substantive law "before coming to rest on the certification question."

Id. (citing *Falcon*, 147 US at 155, 160, 161) (citation and internal quotation marks omitted in original)). This Court further explained:

> [T]he principle that a court must accept as true a plaintiff's allegations in support of class certification merely limits review of the merits of the plaintiff's claim, and should not be invoked to artificially limit the required "rigorous analysis" of the factors necessary to the determination whether plaintiffs have met their burden of establishing each of the certification requirements.

Id. at *4 (citing *Falcon*, 147 US at 161; *Bell v Ascendant Solutions, Inc*, 422 F3d 307, 311-313 (CA 5, 2005) (noting that the suggestion that a court "must accept, on nothing more than pleadings, allegations of elements central to the propriety of class certification" is fundamentally "at odds" with the court's duty to make findings that the requirements for certification have been met")).

While *Jackson* is an unpublished case and as such does not constitute binding precedent under the rule of stare decisis, MCR 7.215(C)(1), the public policy judgments made by this Court in its ruling are sound. The "rigorous analysis" level of scrutiny of class action certification decisions should be applied in this case and in all future cases considering whether to grant class

certification under MCR 3.501. The potential for problems under a laissez-faire approach to class certification is simply too great.

This case provides an example of such a laissez-faire approach. As Defendant-Appellant has aptly explained, the trial court's ruling certifying the class failed to give the appropriate level of scrutiny to whether the purported class claims met the Michigan class action requirements, such as predominance, superiority, typicality and adequacy. The court was clearly erroneous in certifying a class whose members owned property with substantially varying dioxin levels, including some with no elevated dioxin level, with different flooding histories alleged to have caused the dioxin contamination, and some properties subject to other dioxin sources, such as those standing on former industrial or manufacturing sites. In fact, the court entirely ignored that the record shows that the existence and level of any dioxin on a class property will depend on the frequency and lever of any flooding—which has varied significantly from property to property—over the past century. Moreover, the effect of the alleged dioxin contamination on each class members varies considerably, with some expressing no more than vague concerns, others experiencing some impact on their gardening or yard usage, and still others claiming a variety of property value diminution claims. Thus, injury, causation, and damages are all highly individualized issues in this case. Had the court engaged in a "rigorous analysis" of the record and properly applied the class action factors, it would have found that this litigation can only proceed on a case-by-case, property-specific basis.

ARGUMENT I

A "LAISSEZ-FAIRE" APPROACH TO CLASS CERTIFICATION, LIKE THAT TAKEN BY THE TRIAL COURT, INVITES EXCESSIVE AND UNWARRANTED LITIGATION AND ABUSIVE LEGAL PRACTICES.

The ways in which inconsistent and lax certification standards encourage class action abuse became notorious when it spurred a cottage industry in nationwide class litigation in certain state courts in the late 1980s and 1990s. During that time, class action filings against Fortune 500 companies increased 338 percent in federal court and more than 1000 percent in state court. See Federalist Society, Analysis: Class Action Litigation—A Federalist Society Survey, 1:1 Class Action Watch 5 (1999). The RAND Institute reported in 1997 that "class action activity has grown dramatically" with the increase "concentrated in the state courts." Deborah Hensler, et al, Preliminary Results of the RAND Study of Class Action Litigation, 15 (RAND Inst for Civ Justice 1997).

The reason: some state courts did not adopt the United States Supreme Court's requirement for a "rigorous analysis" and took a laissez-faire approach to applying the class certification factors. Entrepreneurial contingency fee lawyers flocked to these state "magnet" courts to file putative class action suits, hoping that class treatment would give them an advantage in litigation. See, e.g., S Rep 109-14, at 14 (explaining that the "explosion" in state class action filings occurred because "many state court judges are lax about following the strict requirements of Rule 23 (or the state's governing parallel rule), which are intended to protect the due process rights of both unnamed class members and defendants.").

Some state trial courts certified classes while federal courts considering identical claims against the same defendant would not, explaining that constitutional due process guarantees prevented class treatment of individualized claims. Compare, e.g., *Ex parte Masonite Corp*, 681 So 2d 1068 (Ala, 1996), citing *Naef v Masonite Corp*, No. CV-94-4033 (Mobile County Cir Ct,

Ala, 11/15/95) (certifying a nationwide class of plaintiffs alleging their house siding was defective) with *In re Masonite Hardboard Siding Products Liability Litigation*, 170 FRD 417, 424, 427 (ED La, 1997) (rejecting class certification of claims against same defendant and presenting identical legal issues, as its analysis found class treatment would, inter alia, infringe the parties' due process rights). Other state courts engaged in so-called "drive by" class certifications, certifying a class at the request of plaintiffs' counsel before defendants were served with a complaint or had been given an opportunity to answer. See, e.g., S Rep 109-14, at 22 (http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports& docid=f:sr014.109.pdf) citing *Davison v Bridgestone/Firestone, Inc*, Case No. 00C-2298 (Eighth Cir Ct, 20th Judicial Dist, Nashville, Tenn, August 18, 2000) (certifying nationwide class just four days after service of the complaint); and *Farkas v Bridgestone/Firestone, Inc*, Case No. 00-CI-5263 (Jefferson County Cir Ct, Ky, August 18, 2000) (ordering injunctive relief in favor of the class before defendant was even notified of the lawsuit). While some plaintiffs' lawyers defended the practice on the ground that the certifications were "conditional" and subject to challenge, it created an uphill battle for defendants.

It became clear through such cases that class certification can greatly influence the dynamics and even the outcome of a lawsuit, a troubling result since the class action device was intended as a procedural tool, not a mechanism to affect substantive litigation results. State courts should be cognizant of past abuses and the opportunities for future ones, and affirmatively work to ensure that their implementation of state class action rules does not invite them. These abuses occur in numerous ways.

A. LAX CLASS ACTION CERTIFICATION ENCOURAGES UNWARRANTED LITIGATION.

As a fundamental matter, class treatment greatly increases the number of claims brought against a defendant. Sometimes class members are swept into lawsuits from which they may not

benefit and that they may not have wanted to bring in the first place. This happens because under the rules in many jurisdictions, including Michigan, once a class is certified, all potential plaintiffs are automatically included in the class unless they affirmatively choose to "opt out." See, e.g., MCR 3.501(A)(3) (addressing class members' right to elect to be excluded from the action); FR Civ P 23(c)(2). Potential class members, who may not understand an opt-out notice written in dense legalese, may inadvertently be included in a class. When this occurs, class members lose their right to bring an individual claim and they are bound by the result obtained by class counsel.

In other cases, plaintiffs may be drawn to participate because of the perception that they can get easy money. As the Honorable Jack B. Weinstein, a judge who has been particularly sensitive to plaintiffs' needs, observed, "[t]he drum beating that accompanies a well-publicized class action ... may well attract excessive numbers of plaintiffs with weak to fanciful cases." *In re "Agent Orange" Products Liability Litigation*, 818 F2d 145, 165 (CA 2, 1987), *cert den* 484 US 1004 (1988). For example, one plaintiff in a mass tort case was quoted in the media as saying that he did not know whether he had a claim, but "heard that they were getting up a suit, ... [and] wanted to get in on the party." Bruce Nichols, *Steel Plant Lawsuit Lingers 9 Years*, Dallas Morning News, April 21, 1996, at 32A.

B. CLASS ACTIONS MAY RESULT IN "JUDICIAL BLACKMAIL."

It is particularly important to closely examine a request for class certification, as the grant of certification places tremendous pressure on a defendant to settle, regardless of a case's merit. The resulting settlements have been variously termed "blackmail settlements,"[1] "legalized

[1] *In re Rhone-Poulenc Rorer, Inc*, 51 F3d 1293, 1298 (CA 7, 1995) (Posner, J.) (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)).

blackmail,"[2] and "judicial blackmail"[3] by federal courts considering nationwide class actions, and the characterization applies equally in high-risk statewide class actions. The specter of a high damages award, potentially including punitive damages, is daunting, whether the case involves a nationwide or a statewide class. "For defendants, the risk of participating in a single trial [of all claims], and facing a once-and-for-all verdict is ordinarily intolerable," even where an adverse judgment is improbable. Barry F. McNeil & Beth L. Fancsal, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 FRD 483, 490 (1996). In addition, the legal defense costs associated with discovery of individual class members' claims, pre-trial practice, and trial can be crippling.

As a result, the economics of class action practice mean that even claims with a very small chance of success at trial are settled when the anticipated costs of defense and the claims for damages are high. Defendants who are forced to settle due to these circumstances are denied appellate review of the claims against them, the most important safeguard against unfairness in the court system. See McNeil & Fanscal, *supra*, at 490. The lack of appellate court review of questionable legal claims, in turn, invites more questionable claims to be filed and "processed," distorting the civil justice system even further.

C. Class Action Status Influences Trial Outcomes.

Class treatment can severely hamper a defendant's prospects at trial by "skewing trial outcomes." *Castano v American Tobacco Co*, 84 F3d 734, 746 (CA 5, 1996). Evidence indicates that the aggregation of claims increases both the likelihood that a defendant will be found liable and the size of any damages award which may result. See McNeil & Fanscal, *supra*,

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[2] *In re Gen Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F3d 768, 784 (CA 3, 1995).

[3] *Castano v American Tobacco Co*, 84 F3d 734, 746 (CA 5, 1996).

at 491-492. Defendants are far more likely to be found liable in cases with large numbers of plaintiffs than in cases involving one or just a few plaintiffs, and their damages (particularly punitive damages) tend to be higher. See *Id.*; Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 Judicature 22 (1989).

Evidence suggests that the presence of even one severely injured plaintiff will likely increase the damages awarded to the other plaintiffs, regardless of individual circumstances. See McNeil & Fanscal, *supra*, at 491; Kenneth S. Bordens & Irwin A. Horowitz, *The Effects of Outlier Presence, Plaintiff Population Size, and Aggregation of Plaintiffs on Simulated Civil Jury Decisions*, 12 L & Human Behavior 209, 211-212, 226 (1988) (juror interviews from actual trial and empirical research indicate jurors assume all plaintiffs will suffer as much harm as the most severely injured person). This gives those class members with less severe injuries a windfall benefit. *Id.*; McNeil & Fanscal, *supra*, at 491. Likewise, in settlements, the higher potential jury award value for serious claims is spread to weaker claims, at least in part. This benefits those with weaker claims and the attorneys who receive contingency fees at the expense of those who have experienced greater injury. See Christopher Edley, Jr., *Prepared Statement Concerning H.R. 1283, The Fairness in Asbestos Compensation Act: Hearing on H.R. 1283 Before the House Committee on the Judiciary*, 106th Cong, at II 1 (July 1, 1999) (discussing treatment of consolidated dissimilar claims in asbestos litigation).

D. CLASS ACTIONS LET LAWYERS BENEFIT AT THEIR CLIENTS' EXPENSE.

1. PLAINTIFFS' LAWYERS CALL THE SHOTS.

The class action system allows lawyers, not their clients, to decide when and whether to file lawsuits. While some class actions undoubtedly spring from the concerns of injured consumers, many are the result of the creativity of entrepreneurial contingency fee lawyers.

Plaintiffs' lawyers search for some corporate misstep that arguably could constitute a colorable claim by scanning newspapers, searching the Internet, and digging through advertisements. See Editorial, *Class War*, Wall St J, March 25, 2002, at A18. Once they identify a "misstep," they typically find friends or colleagues who fit the class to be the representative plaintiffs. *Id.* However, unnamed class members—the real parties in interest - may not want their claims adjudicated in the forum chosen or under the strategies selected. They may not even want to be plaintiffs.

Lawyer-driven class actions can put class members' rights at risk by proceeding on a lowest-common-denominator basis. Class members with more serious and complex claims may simply be "lumped into" the rest of the class and not given the individual attention they need. See John H. Beisner, *Prepared Statement Before the Subcomm. On Administrative Oversight and the Courts of the U.S. Senate Committee on the Judiciary, Hearing on S. 353: The Class Action Fairness Act of 1999*, 10 (May 4, 1999), available in Federal News Service. Moreover, plaintiffs' lawyers may dispense with certain claims for tactical reasons - such as waiving fraud claims because they require individual demonstrations of reliance that can defeat class status. See *Id.*

Unnamed class members, particularly those without legal training, have little say in how their claims are handled. Notices of class actions or proposed settlements provide little or no information about rights to class members not versed in legalese. Class members may therefore miss opportunities to make the crucial decision to opt out of a plaintiff class.

2. PLAINTIFFS' LAWYERS CAN GENERATE WINDFALL FEES, LEAVING THEIR CLIENTS EMPTY-HANDED.

The opportunity to generate large fees is a major reason plaintiffs' lawyers file class actions. As Stanford University Law Professor Deborah Hensler observed, "[l]awyers are entrepreneurial, they're part of the capitalist economy, and there are very powerful economic

incentives to bring these types of lawsuits." Eddie Curran, *On Behalf of All Others: Legal Growth Industry Has Made Plaintiffs of Us All*, Mobile (Ala) Register, December 26, 1999, at 1A.

While class counsel should receive fair compensation for work to further their clients' interests, class action settlements have been abused in courts that use a "rubber stamp" approach in their class action decisions. This allows class lawyers to bring in windfall fees at the expense of their clients. One notorious example is the Bank of Boston case, which involved allegations that the Bank of Boston had over-collected escrow monies from homeowners and profited from the interest. *Kamilewicz v Bank of Boston Corp*, 92 F3d 506, 508-509 (CA 7, 1996), cert den 520 US 1204 (1997). The settlement awarded up to $8.76 to individual class members. See *Id.* The plaintiffs' lawyers received more than $8.5 million in fees, which were debited directly from individual class members' escrow accounts, leaving many of them worse off than they were before the suit. See Barry Meier, *Math of a Class-Action Suit: 'Winning' $2.19 Costs $91.33*, NY Times, November 21, 1995, at A1. In testimony before the Subcommittee on Administrative Oversight and the Courts, class member Martha Preston recounted how she received $4 from the settlement, but was charged a mysterious $80 "miscellaneous deduction," which she later learned was an expense used to pay the class lawyers' settlement fees. S Rep 109-14, 14-15.

Another is the practice of "coupon settlements" that began in the early 1990s. These settlements provided that class members received coupons, often for the same product or services at issue in the suit and accompanied by restrictions that made them difficult to use, while class counsel were rewarded with millions of dollars in fees. See S Rep 109-14 (providing numerous examples of such settlements). Congress recently curbed the use of coupon settlements in interstate class actions when it enacted the Class Action Fairness Act of 2005 (CAFA), PL 109-

2, § 3, 119 Stat 4 (codified at 28 USC §§ 1711-1715), but the potential for its exploitation in statewide class litigation remains.

These problems certainly do not mean that class actions are always or almost always inappropriate. What is important to understand is that it is critical for a trial court to give serious consideration to the question of whether class certification in a given case is appropriate and desirable under the factors set forth in the class action rule.

ARGUMENT II

IF LEFT TO STAND, THE TRIAL COURT'S RULING WILL FOSTER UNWARRANTED CLASS LITIGATION AND MAKE MICHIGAN COURTS A MAGNET FOR STATEWIDE CLASS ACTIONS.

The legal and public policy implications of this case are important to interests beyond the litigants before the Court. If allowed to stand, the trial court's ruling sanctioning the "rubber stamping" of class certification requests would adversely impact Michigan-based businesses and the state's economy, Michigan consumers, and participants in the state's civil justice system.

Michigan courts would likely be flooded with statewide class actions under this standard, particularly in light of the recent enactment of CAFA. When CAFA was enacted, class litigation practice was an extremely lucrative cottage industry for a certain segment of the contingency fee bar. State courts with lax class certification standards provided the key to this business, as they allowed lawyers to obtain nationwide classes in state courts and wield the power of class certification to generate lucrative settlements and high fee awards. See generally Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 Harv J Legis 483 (2000).

Congress enacted CAFA to reduce this forum shopping by providing federal jurisdiction over class actions with certain interstate characteristics. Importantly, out of respect for federalism and states' interests in addressing issues primarily affecting their own jurisdictions, Congress did not provide solutions for abuses in intrastate class action litigation. Lawyers seeking to fill the gap in their litigation portfolios created by CAFA will naturally turn to states with easy class certification rules and avoid federal jurisdiction, for example, by suing only in-state businesses or including mostly resident plaintiffs as class members. See Victor E. Schwartz, *The Class Action Fairness Act of 2005: The Defense Discusses Benefits and Minefields, Products Liability L & Strategy*, Vol 24, No. 3, September 2005, at 1, 4-5. As a result, the composition of class action lawsuits brought in state courts will change, but attempts to abuse them will not.

A. POTENTIAL EFFECTS ON MICHIGAN BUSINESSES, CONSUMERS AND THE ECONOMY.

Michigan businesses would be likely to become repeated targets of unwarranted class litigation under the trial court's laissez-faire class certification standard. CAFA contains provisions that could allow sizable class actions to proceed in a state court. For example, if all of the defendant companies are citizens of the forum state, a federal court can decide to allow the class action to proceed in state court even if up to two-thirds of the class members are from other states. PL 109-2, § 4, 119 Stat 9, 10, 28 USC §§ 1332(d)(3) & (d)(4)(A)(i)(I). Plaintiffs' lawyers already have illustrated their ability to generate class action claims from thin air. See *Class War, supra*. They would be likely to concoct claims against Michigan-based businesses in order to pursue class actions in Michigan courts, rather than try to meet the more exacting class certification standards used in federal court and in other states.

The adverse effects of excessive litigation on business and industry are well-documented. Corporations that are subject to repeated lawsuits are unwilling or unable to invest resources in

the development of new products and services. They are forced to pass their liability and legal defense costs on to consumers, resulting in higher prices. They may be forced to withdraw beneficial products and services because the litigation costs associated with them are too much to bear. See, e.g., Steven B. Hantler, Mark A. Behrens & Leah Lorber, *Is the "crisis" in the civil justice system real or imagined?* 38 Loy L R 1113, 1120 & n 31 (2005) (providing examples of effects of excessive liability); Michael Moore & W. Kip Viscusi, *Product liability, research and development, and innovation*, 101 J of Political Econ 161, 174-175 (1993) (explaining that once damages become excessively high, either product development will stagnate or firms will withdraw from the market altogether); P.W. Huber & R.E. Litan, eds, *The Liability Maze 5-7* (The Brookings Inst, 1991) (noting that in the United States, excessive liability has created problems in a number of industries, raising consumer costs, causing beneficial products to be removed from the market, discouraging innovation, and leading to corporate layoffs and bankruptcies).[4]

If the state gains a reputation for having a lax class certification standard, then economic development efforts will be hampered by unwarranted class litigation, as new companies are likely to decide against basing themselves in Michigan and existing companies may move their headquarters elsewhere to avoid the potential for overwhelming liability costs. At the worst end of the spectrum, as illustrated by years of asbestos litigation, lie litigation-driven corporate bankruptcies, job layoffs, and company closings, with adverse consequences for employees, shareholders, and retirees with investments in those companies. See Mark A. Behrens & Manuel

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[4]A Conference Board survey of more than 2,000 chief executive officers in 1988 found that 36 percent of the companies had discontinued product lines as a result of actual liability experience and that 11 percent of the companies had done so based on anticipated liability problems. Thirty percent of the companies surveyed had decided against introducing new products and 21 percent had discontinued product research as a result of adverse liability experiences. See S Rep No 105-32, at 8 (citing E. Patrick McGuire, *The Impact of Product Liability*, The Conference Board, Research Report No. 908, tbl 28 (1988)).

Lopez, *Unimpaired asbestos dockets: they are constitutional*, 24 R Litig 253, 254, 285-286 (2005).[5]

B. Potential Effects On The Michigan Court System And Its Participants.

The Michigan civil justice system itself would suffer under the trial court's certification standard, particularly in light of another CAFA provision which allows a class action to proceed in state court if there are up to 99 plaintiff class members, whether from the forum state or elsewhere. PL 109-2, § 4, 119 Stat 10; 28 USC § 1332(d)(5). An adroit plaintiffs' lawyer could seek to evade this restriction by filing multiple class action complaints, identical except for narrowly drawn class descriptions, thereby keeping essentially national claims in state court, subject to what would be a less-rigorous class certification standard.[6] While CAFA provides the

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[5]The Conference Board also reported that as a result of actual adverse liability experiences, 15 percent of the companies had laid off workers, and 8 percent closed production plants. Nearly a quarter of the companies lost market share, and 17 percent decided against acquiring or merging with another company. See *Id.*

[6]In a parallel example of profit-driven legal creativity, in August 2005 lawyers filed more than 1,000 claims in Alabama state court alleging injury from decades-old pollution from polychlorinated biphenyls, or PCBs, in and around Anniston, Alabama. Most of the lawsuits were filed in neat packages of just under 100 plaintiffs, apparently to avoid any attempt to move them to federal court in accordance with CAFA. PL 109-2 § 4, 119 Stat 11, 28 USC § 1332(d)(11)(A) (providing for removal to federal court of "mass action" state court cases with 100 or more plaintiffs). These filings came just two years after a $700 million global settlement resolved the claims of more than 20,000 plaintiffs in two massive class action PCB lawsuits—and awarded class counsel (including some of these lawyers) over 40 percent of that amount in fees. See Assoc Press, *$700 Million Settlement in Alabama PCB Lawsuit*, NY Times, August 21, 2003, at C4; Charles Seabrook, *PCB Settlement Share Irks Claimants; Lawyers Win Big in Alabama Class-Action Case*, Atlanta J & Const, April 12, 2004, at A1; Jay Reeves, *Attorney Fees Rile Alabama Plaintiffs; PCB Victims Average $7,725 Each, Lawyers About $4 Million Each*, St Louis Post-Dispatch, March 24, 2004, at C1. See also *Reaves v Pharmacia Corp*, No. 05-4624 (Jefferson County Cir Ct, Ala) (filed August 5, 2005) (96 listed plaintiffs); *Satcher v Pharmacia Corp*, No. 05-4623 (Jefferson County Cir. Ct., Ala.) (filed August 5, 2005) (79 listed plaintiffs); *Conley v Pharmacia Corp*, No. 05-4622 (Jefferson County Cir Ct, Ala) (filed August 5, 2005) (96 listed plaintiffs); *Allen v. Pharmacia Corp*, No. 05-4671 (Jefferson County Cir Ct, Ala) (filed August 9, 2005) (99 listed plaintiffs); *Abbott v Pharmacia Corp*, No. 05-4718 (Jefferson County Cir Ct, Ala) (filed August 11, 2005) (99 listed plaintiffs); *Bentley v Pharmacia Corp*, No. 05-4824 (Jefferson County Cir Ct, Ala) (filed August 15, 2005) (99 listed plaintiffs);
(Continued on next page.)

potential for some relief in such situations, such claims could flood court dockets, consuming court resources and delaying the adjudication of the claims of Michigan residents and others who legitimately deserve access to Michigan courts. There is no reason for Michigan courts to encourage the development of class action mills within the state.

ARGUMENT III

THIS COURT SHOULD REJECT PLAINTIFFS' NOVEL APPROACH TO CLASS CERTIFICATION BASED ON THE LOWEST COMMON DENOMINATOR.

Plaintiffs-Appellees' brief suggests a novel and dangerous approach to class certification that this Court should firmly reject. Faced with the fact that the property of class members have substantially varying levels of dioxin, including some that do not have more than background

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(Continued from previous page.)
Cambric v Pharmacia Corp, No. 05-4823 (Jefferson County Cir Ct, Ala) (filed August 16, 2005) (99 listed plaintiffs); *Adams v Pharmacia Corp*, No. 05-4865 (Jefferson County Cir Ct, Ala) (filed August 17, 2005) (93 listed plaintiffs); *Kelley v Pharmacia Corp*, No. 05-4967 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Roberts v Pharmacia Corp*, No. 05-4968 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Stanfield v Pharmacia Corp*, No. 05-4969 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Brown v Pharmacia Corp*, No. 05-4969 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Carlisle v Pharmacia Corp*, No. 05-4963 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (98 listed plaintiffs); *Clayburn v Pharmacia Corp*, No. 05-4964 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (74 listed plaintiffs); *Fitzpatrick v Pharmacia Corp*, No. 05-4965 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Taylor v Pharmacia Corp*, No. 05-4970 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Woods v Pharmacia Corp*, No. 05-4971 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Austin v Pharmacia Corp*, No. 05-4962 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Bowman v Pharmacia Corp*, No. 05-4960 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (96 listed plaintiffs); *Ary v Pharmacia Corp*, No. 05-4987 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs); *Creed v Pharmacia Corp*, No. 05-4988 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs); *Henderson v Pharmacia Corp*, No. 05-4989 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs); *Moates v Pharmacia Corp*, No. 05-4990 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs); *Roberts v Pharmacia Corp*, No. 05-4991 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs); *Thompson v Pharmacia Corp*, No. 05-4992 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs); *Aderholt v Pharmacia Corp*, No. 05-4982 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs).

levels of dioxin, and that each property has a different flooding history and other potential sources of contamination, plaintiffs' propose that class certification proceed based on the lowest common denominator. That is, plaintiffs request that the court certify a class based on the barest minimum alleged commonality—that they are located within the one-hundred year Flood Plain of the Tittabawassee River and allegedly share a fear that the river could flood at unknown times and frequency in the future, could leave contamination on their property related to the defendant company after sufficient repeated flooding, and could impact their use and enjoyment of the property at some undetermined future date. See Plaintiffs-Appellees' Brief at 16 ("Plaintiffs allege that all class members have been injured by Dow's contamination, because it has already invaded (or threatened to invade) Plaintiffs' property or because future flooding bringing additional contamination is a virtual certainty.") (emphasis added); see also *Id.* at 23-25 (discussing the threat of future flooding and contamination). This is essentially a fear of a future injury claim.

Such a class includes members whose concern is a purely speculative future harm, among those who claim they have documented contamination on their property. As plaintiffs concede, "One cannot predict how floods will behave or exactly where they will deposit the most contaminated sentiments." *Id.* at 26. Aside from the obvious lack of typicality between members who might experience future contamination and those who have found contamination on their property, as a matter of public policy, courts should not certify such a claim. The class action mechanism generally serves two purposes: (1) to provide the ability to bring a lawsuit where the individual claims are small and there otherwise might not be an effective remedy; and (2) to provide judicial efficiency in deciding substantially identical claims. See *Pressley v Lucas*, 30 Mich App 300; 186 NW2d 412 (1971) ("By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility

of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.") (quoting *Eisen v Carlisle & Jacquelin*, 391 F2d 555, 560 (CA 2, 1968)). Neither of these policy bases apply in this case. Here, each plaintiff who has experienced a loss of use or enjoyment of property has the ability and adequate incentive to bring a nuisance action seeking injunctive relief. Moreover, judicial efficiency is not achieved by bringing class treatment in a nuisance action based on speculative fears of future contamination, where the highly individualized issues arising from the assessment of the effect of the alleged conduct on each plaintiff's property and remedy are only compounded by further assessing the level and impact of the threat (if any) of future contamination. The river-flooding based claims erroneously certified below is illustrative: each class member's claim based on the fear of future contamination would depend on highly individualized and subjective factors, including the varying level of risk of varying levels of frequency of flooding for his or her class property, the impact of any such future repeated flooding on his or her use of the property, as well as impact of that risk of the individual's state of mind.

Allowing for "threat-based" class actions is contrary to Michigan law which disfavors claims where there is only a fear of future injury; these claims are particularly susceptible to class action abuse. For example, in this very case, the Michigan Supreme Court recognized that allowing a claim for medical monitoring would result in a "potentially limitless pool of plaintiffs," allowing personal injury lawyers to "virtually begin recruiting people off the street" to act as plaintiffs. See, e.g., *Henry v Dow Chem Co*, 473 Mich 63, 84-85; 701 NW2d 684, 694 (2005). The Court also recognized that lawsuits by plaintiffs who are not presently hurt have the potential to "create a stampede of litigation" and "drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care." 473 Mich at 84-

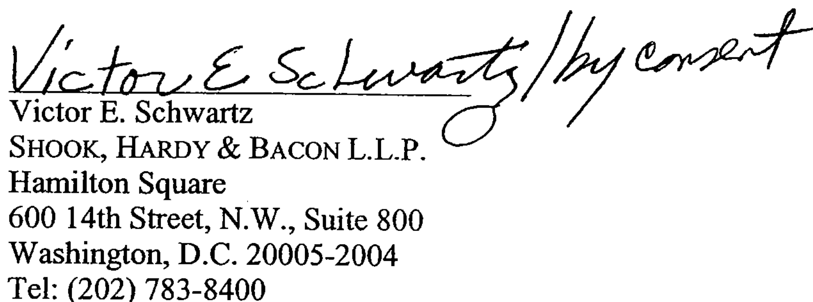
85; 701 NW2d at 694-695. The Court has also recognized the principle that a plaintiff must show a tangible injury in other types of actions where, without some reasonable limit, the potential for unbridled claims exists. See, e.g., *Bogaerts v Multiplex Home Corp*, 423 Mich 851, 851; 376 NW2d 113, 113 (1985) (reinstating trial court order vacating emotional damages award where plaintiffs "failed to allege and prove a sufficient physical injury"); *Daley v LaCroix*, 384 Mich 4, 12-13; 179 NW2d 390, 395 (1970) (recovery available only where a "definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant's negligent conduct"); *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 319; 399 NW2d 1, 9 (1987) (cancer-related claims do not accrue until "the discoverable appearance of cancer").

The same public policy considerations hold true with respect to the plaintiffs' request for class treatment of a nuisance claim resting on a fear of future harm. If this Court recognizes such an action, plaintiffs lawyers could file class action lawsuits on behalf of groups of individuals around nearly any industrial facility, claiming that a substance released from that facility might fall on the land of some of the thousands of people surrounding the site at some undetermined point in the future and could affect the future use and enjoyment of the property.

CONCLUSION

For the foregoing reasons, *Amici Curiae* the Defense Research Institute, the Michigan Trial Defense Counsel, the Chamber of Commerce of the United States of America, the American Tort Reform Association, the American Chemistry Council, and the National Association of Manufacturers respectfully request this Court to reverse the trial court's order granting plaintiffs' motion for class certification dated October 21, 2005, and rule that a "rigorous analysis" of the class action factors is required before a class action can be certified under MCR 3.501.

Respectfully submitted,



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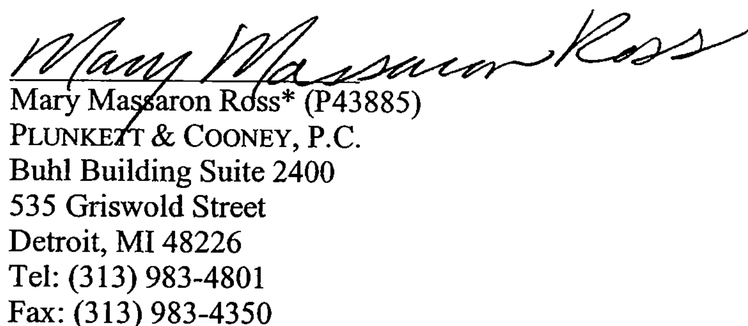

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A

STATE OF MICHIGAN

COURT OF APPEALS

KEVAN JACKSON, JR.,

Plaintiff-Appellant/Cross-Appellee,

and

BRENDA SCOTT, PAMELA MACKERWAY, LINDSAY ARMANTROUT, NADIA ZUFELT CRYSTAL PATTON, and TERESA BAUSCHKE,

Plaintiffs,

v

WAL-MART STORES, INC. and SAM'S CLUB,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
November 29, 2005

No. 258498
Saginaw Circuit Court
LC No. 01-040751-NZ

Before: Gage, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Plaintiff Kevan Jackson, Jr. appeals as of right the trial court's opinion and order denying class certification of this action alleging unjust enrichment and breach of an implied-in-law contract.[1] Defendant Wal-Mart Stores, Inc. cross-appeals, challenging the trial court's opinion and judgment, entered following a bench trial, awarding Jackson $539.14 for time worked by Jackson for which he was not compensated during his employment by Wal-Mart. In both instances, we affirm.

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[1] Although plaintiffs Brenda Scott, Pamela Mackerway, Lindsay Armantrout, Nadia Zufelt, Crystal Patton, and Teresa Bauschke originally joined Jackson in seeking class action certification, each has since been either dismissed from this suit or have had their claims severed from the instant action and transferred to their counties of residence. Accordingly, Jackson is the sole-remaining plaintiff and appellant in this matter. Nonetheless, to avoid confusion we refer to all plaintiffs in discussing the class certification matter at issue in this appeal.

I. Basic Facts and Procedural History

This case arises from allegations that, through a system of restrictive budgetary and employment practices, Wal-Mart Stores, Inc. (Wal-Mart) and its subsidiary, Sam's Club, improperly required employees of their Michigan stores to perform work without compensation during the six-year period between September 26, 1995 and September 26, 2001. On September 26, 2001, onetime plaintiff Brenda Scott[2] filed a six-count complaint seeking, on behalf of herself and all other similarly situated current and former hourly employees of Wal-Mart's Michigan stores, compensation for time she allegedly worked "off the clock" and for missed and/or shortened rest and meal break periods. Although initially alleging various tort theories of recovery, Scott's complaint was ultimately amended to allege only breach of an implied in law contract and unjust enrichment, and to add Kevan Jackson, Jr., Pamela Mackerway, Crystal Patton, Lindsay Armantrout, Teresa Bauschke, and Nadia Zufelt as plaintiffs and potential class representatives.

In accordance with MCR 3.501(B)(1), plaintiffs moved for class certification on December 26, 2001, arguing that their suit meets the requirement for class certification as set forth in MCR 3.501(A)(1).[3] Following an extensive period of discovery and an evidentiary hearing on plaintiffs' motion, the trial court concluded that plaintiffs had failed to meet any of the several requirements for certification of plaintiffs' suit as a class action under MCR 3.501(A)(1). Each of the plaintiffs' individual claims were thereafter severed, and their respective cause of actions transferred to the counties in which the claim arose. Because his claims arose from employment at Wal-Mart's Saginaw store, plaintiff Kevan Jackson, Jr.'s claims remained in the Saginaw Circuit Court and were tried before the bench. As previously noted, at the conclusion of the proofs at trial, the trial court issued an opinion and judgment awarding Jackson $539.14 as compensation for missed breaks and time worked while "off the clock" during his employment at Wal-Mart's Saginaw store. These appeals followed.

II. Analysis

A. Denial of Class Certification

Plaintiffs argue that the trial court erred in finding that he failed to meet any of the several requirements for certification of his suit as a class action. A trial court's decision on a motion for certification as a class action is reviewed for clear error. *Hamilton v AAA Michigan*, 248 Mich App 535, 541; 639 NW2d 837 (2001). "A finding is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *Neal v James*, 252 Mich App 12, 15; 651 NW2d 181 (2002).

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[2] See note 1.

[3] MCR 3.501(B)(1)(a) provides that "[w]ithin 91 days after the filing of a complaint that includes class action allegations, the plaintiff must move for certification that the action may be maintained as a class action."

Pursuant to MCR 3.501(A)(1), a member of a class may maintain a suit as a representative of all members of that class only if each of the following requirements are met:

> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

Plaintiff argues that these requirements, often referred to as numerosity, typicality, commonality, adequacy, and superiority, are each present in this case and that class certification should, therefore, have been granted by the trial court. We disagree.

The party requesting certification of the class action bears the burden of demonstrating that the action meets the conditions for certification found in MCR 3.501(A)(1). *Neal, supra* at 16. When evaluating a motion for class certification, the trial court may not examine the merits of the case. *Id.* at 15. Rather, it must accept as true the allegations made in support of the request for certification. *Id.* This does not, however, require that the trial court "blindly rely on conclusory allegations" that merely "parrot" the requirements for class certification. See 3 Newberg & Conte, Newberg on Class Actions (4th ed), § 7.26, p 81. To the contrary, class certification should be granted only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of [class certification] have been satisfied." *Gen Tel Co of the Southwest v Falcon*, 457 US 147, 161; 102 S Ct 2364; 72 L Ed 2d 740 (1982).[4] Because "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,'" such analysis may, and often does, require that the court "probe behind the pleadings" and analyze the claims, defenses, relevant facts, and applicable substantive law "before coming to rest on the certification question." *Id.* at 155, 160 (citation and internal quotation marks omitted).

With these principles in mind, we address the merits of plaintiffs' challenge of the trial court's denial of its request to certify this matter as a class action.

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[4] "Because there is limited case law in Michigan addressing class certifications, this Court may refer to federal cases construing the federal rules on class certification." *Neal, supra* at 15; see also *Zine v Chrysler Corp*, 236 Mich App 261, 288 n 12; 600 NW2d 384 (1999).

1. Numerosity

As previously noted, in order to obtain class certification, a plaintiff must satisfy each of the requirements of numerosity, commonality, typicality, adequacy, and superiority. *Neal, supra* at 16. To prove numerosity, a plaintiff is required to demonstrate that the putative class is "so numerous that joinder of all members is impracticable." MCR 3.501(A)(1)(a). Although in doing so the party is not required to plead and prove the exact number of class members, *Zine v Chrysler Corp*, 236 Mich App 261, 288; 600 NW2d 384 (1999), "impracticability of joinder must be positively shown, and cannot be speculative." *McGee v East Ohio Gas Co*, 200 FRD 382, 389 (SD Ohio, 2001) (citations and internal quotation marks omitted). As stated by this Court in *Zine, supra* at 287-288:

> Because the court cannot determine if joinder of the class members would be impracticable unless it knows the approximate number of members, the plaintiff must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members. [(Internal citations omitted).]

In *Zine, supra* at 265, plaintiffs Christopher Zine and Leonard and Lois Terry filed a proposed class action alleging that informational booklets provided by Chrysler to each purchaser of new Chrysler products erroneously misled the purchaser to believe that Michigan did not have a "lemon law" and that an arbitration board established by Chrysler was their only remedy for defective vehicles. The plaintiffs asserted that the class potentially included each of the more than 522,600 persons who had purchased a Chrysler vehicle during the relevant time period. *Id.* at 267. In affirming the trial court's conclusion that the plaintiffs' evidence and allegations in this regard were insufficient to establish numerosity, this Court stated:

> Neither Zine nor the Terrys identified a specific number of class members, but indicated that the class potentially included all 522,658 purchasers of new Chrysler products from February 1, 1990, onward. However, class members must have suffered actual injury to have standing to sue, *Sandlin* [*v Shapiro & Fishman*, 168 FRD 662, 666 (MD Fla, 1996)], so plaintiffs must show that there is a sizable number of new car buyers who had seriously defective vehicles and lost their right to recovery under Michigan's lemon law because they were mislead by the documents supplied by Chrysler. Neither Zine nor the Terrys indicated even approximately how many people might come within this group, nor did they indicate a basis for reasonably estimating the size of the group. Therefore, both Zine and the Terrys failed to show that the proposed class is so numerous that joinder of all members is impracticable. [*Id.* at 288-289.]

In this case, plaintiffs defined the class sought to be represented by them as "all current and former hourly employees of Wal-Mart Stores, Inc., . . . in the State of Michigan who have worked off-the-clock without compensation, and/or worked through any part of a rest and/or meal break during the period from September 26, 1995 to the present . . . ." Relying on *Zine, supra*, the trial court found that although plaintiffs had presented evidence that Wal-Mart had employed approximately 96,000 people in its Michigan stores during the prescribed period, plaintiffs "made no allegations as to a number of potential members that have suffered an actual injury," and failed to present any "reasonable way to estimate the size of the proposed class."

Therefore, the court concluded plaintiffs had failed to meet their burden of establishing that "the class is so numerous that joinder is impracticable."

On appeal, plaintiffs do not challenge the applicability of *Zine*, or the trial court's reliance thereon to conclude that plaintiffs had failed in their burden of establishing that the class was so numerous as to make joinder of the members impracticable. Rather, plaintiffs assert that the trial court was required to accept as true that each of the 96,000 persons employed by Wal-Mart during the prescribed period had been forced to work off the clock or otherwise forgo rest or meal breaks as a result of the corporate-wide budgetary policies allegedly employed by Wal-Mart. This assertion, however, is inconsistent with both the rationale employed in *Zine* as well as the definition of the class provided by plaintiffs in their complaint, which expressly limits the proposed class to those employees who in fact worked off the clock or had forgone rest or meal breaks. Moreover, the principle that a court must accept as true a plaintiff's allegations in support of class certification merely limits review of the merits of the plaintiff's claim, and should not be invoked to artificially limit the required "rigorous analysis" of the factors necessary to the determination whether plaintiffs have met their burden of establishing each of the certification requirements. *Falcon, supra*; see also *Love v Turlington*, 733 F2d 1562, 1564 (CA 11, 1984); *Bell v Ascendant Solutions, Inc*, 422 F3d 307, 311-313 (CA 5, 2005) (noting that the suggestion that a court "must accept, on nothing more than pleadings, allegations of elements central to the propriety of class certification" is fundamentally "at odds" with the court's duty to make findings that the requirements for certification have been met).

As recognized by the trial court in employing the rationale of *Zine*, in order to meet their burden of establishing numerosity, i.e., that joinder of all class members is impracticable, plaintiffs were required to provide some evidence reasonably estimating or otherwise showing the number of proposed class members who suffered actual injury. *Zine, supra* at 288-289. Although plaintiffs offered evidence estimating the total number of persons employed by Wal-Mart during the relevant time period, plaintiffs offered no proof or estimate of the size of the actual proposed class, i.e., those employees who were forced to work off the clock or to forgo rest and meal breaks during that period.[5] Accordingly, the trial court could not ascertain whether

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[5] Plaintiffs attempted, through the use of expert testimony, to assert a method for reasonably estimating the size of the proposed class through a series of random surveys and extrapolation of electronic time card punch data available for a five-week period between January 2001 and early February 2001, when Wal-Mart repealed its policy requiring that employees punch out for rest breaks. However, although not expressly addressing the merits of this methodology, in concluding that "[t]here is no way to reasonably estimate the size of the proposed class," the trial court impliedly rejected that methodology as unreasonable for purposes of establishing numerosity. Other than their assertion that the testimony of their expert constitutes, under *Zine, supra* at 288, "some evidence" to establish by reasonable estimate the number of class members, plaintiffs offer no argument to support that the trial court clearly erred in rejecting a methodology by which the break patterns of more than 96,000 employees over a six-year period would be determined through the use of random polling and extrapolation of electronic data collected over a period of only five weeks.

the numerosity requirement was satisfied and, as such, did not clearly err in concluding that plaintiffs had failed to meet their burden in that regard. *Zine, supra*; *Neal, supra* at 15.

2. Commonality

As indicated above, MCR 3.501(A)(1)(b) requires that there be "questions of law or fact common to the members of the class that predominate over questions affecting only individual members." In *Zine, supra* at 289, this Court explained that this "common question factor is concerned with whether there 'is a common issue the resolution of which will advance the litigation,' [and] 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.'" (Citations omitted). Here, the trial court concluded that although such matters as whether Wal-Mart engaged in a pattern or practice that caused its employees not to report all time worked or to forgo rest and meal breaks were common to all members of the proposed class, Wal-Mart's liability for such conduct, and the extent thereof, could "only be answered by individualized inquiry" into the circumstances of each class member. Thus, the court concluded, "common questions of law or fact do not predominate over questions affecting only individual members." In reaching this conclusion, the trial court rejected plaintiffs' allegation that the need for such individualized inquiry could be obviated by the use of statistical models developed through the use of random surveys and the records of Wal-Mart's employee database.[6] As explained below, we find no clear error in the trial court's conclusion that individual inquiries, which cannot be adequately circumvented by statistical sampling or a general review of employee time records, predominate over the common questions in this matter.

As previously noted, in determining whether certification as a class action is appropriate, it is often necessary that the court analyze the claims, defenses, and substantive law applicable in the suit at issue. *Falcon, supra* at 155, 160. Here, plaintiffs alleged damages and associated liability under two purportedly separate theories of recovery: breach of an implied in law contract and unjust enrichment. It is well settled, however, that a contract implied by law "is not a contract at all," but rather an obligation imposed by the law "where there is a receipt of a benefit by a defendant from a plaintiff and retention of the benefit is inequitable, absent reasonable compensation." *In re Lewis Estate*, 168 Mich App 70, 74; 423 NW2d 600 (1988). Thus, plaintiffs' claim for breach of an implied in law contract is itself a claim for unjust enrichment. See *Tingley v 900 Monroe, LLC*, 266 Mich App 233, 247; ___ NW2d ___ (2005) ("[a] claim of unjust enrichment requires proof that the defendant received a benefit from the plaintiff and that permitting the defendant to retain the benefit would result in inequity to the plaintiff"); see also *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993)

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[6] Contrary to plaintiffs' assertion, the trial court did not reject statistical modeling as an acceptable manner of overcoming the need for individual inquiry into such matters as liability and damages solely on the ground that plaintiffs' statistical expert, Dr. Martin Shapiro, acknowledged at the class certification hearing that such modeling would not be "100% accurate." Although noting Shapiro's acknowledgement in this regard, the court also relied on the highly individualized nature of the inquiries that, as explained below, are required to establish liability and damages under the theories of recovery alleged by plaintiffs.

(when such elements exists, "the law operates to imply a contract in order to prevent unjust enrichment"). As such, to establish liability under either theory alleged, plaintiffs are required to show that Wal-Mart received a benefit from its employees, the retention of which without compensation would result in an inequity to those persons. *Tingley, supra.* While the receipt of a benefit by Wal-Mart, in the form of work performed off the clock or during periods when an employee was entitled to be on break, might adequately be shown by the statistical models profferred by plaintiffs, whether inequity would result from retention of that benefit necessarily requires inquiry into the reasons why each individual member of the proposed class performed work off the clock or missed rest or meal breaks. As noted by the trial court, the evidence presented by the parties indicated that while some potential class members were expressly required by their supervisors to work off the clock or forgo a break, others had either never performed work off the clock or simply chose to do so for a number of personal reasons.[7] Other evidence indicated that the performance of work off the clock or during rest or break periods varied with the positions held by an employee. Indeed, plaintiff Pamela Mackerway herself testified that although she occasionally performed off-the-clock work while assigned to the receiving department, she never did so while working in the claims department. Plaintiff Kevan Jackson similarly testified that while he regularly missed rest breaks as an inventory control specialist and bike assembler, he always received all meal and rest breaks to which he was entitled while working as an overnight stocker. The evidence further indicated that many proposed class members failed to consistently punch in and out for both breaks and scheduled work shifts for a variety of reasons, including forgetfulness and mere convenience, and that some employees opted to forgo submission of a request to adjust their time to account for missed breaks or work performed off the clock, despite their awareness they could do so. These highly individualized scenarios directly affect the equities of any claim for unjust enrichment by the proposed class members. Moreover, as recognized by the court in *Basco v Wal-Mart Stores, Inc*, 216 F Supp 2d 592, 603 (ED La, 2002), plaintiffs' "proposed statistical analysis ignores the highly individualized issues . . . [regarding] the myriad of reasons why any employee may have missed a meal or work break or worked off-the-clock, [and the] possible defenses available to defendant to explain or justify any employee's missed work or meal break or work off-the-clock."

Accordingly, because many of the claims will stand or fall, not on the answer to the question whether Wal-Mart, as the result of a policy or practice that caused its employees not to report all time worked or to forgo required rest and meal breaks, received a benefit, but on the resolution of the highly individualized question whether it would be inequitable for Wal-Mart to retain that benefit without compensation, we do not conclude that the trial court clearly erred in finding that plaintiffs failed to satisfy the requirement of commonality set forth in MCR 3.501(A)(1)(b). See *Rutstein v Avis Rent-A-Car Systems, Inc*, 211 F3d 1228, 1234 (CA 11,

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[7] Although plaintiffs assert in their brief on appeal that "numerous courts" have rejected the contention that the voluntary nature of missed breaks or off-the-clock work will excuse an employer from compensating its employees for such matters, the sole authority cited by plaintiffs for their assertion in this regard concerns the statutory requirement for overtime pay under the Fair Labor Standards Act of 1938, 29 USC 201, *et seq*. In contrast, the claims at issue here seek recovery in equity, for which the voluntary nature of the work at issue is highly relevant.

2000) ("[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"); see also *Klay v Humana, Inc*, 382 F3d 1241, 1255 (2004) (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").

3. Typicality

MCR 3.501(A)(1)(c) requires that the claims of the representative parties be "typical of the claims . . . of the class" as a whole. As this Court explained in *Neal, supra* at 21:

> The typicality requirement . . . directs the court "to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large." While factual differences between the claims do not alone preclude certification, the representative's claim must arise from "the same event or practice or course of conduct that gives rise to the claims of the other class members and . . . [be] based on the same legal theory." In other words, the claims, even if based on the same legal theory, must all contain a common "core of allegation." [quoting *Allen v Chicago*, 828 F Supp 543, 553 (ND Ill, 1993) (citations omitted).]

Here, the trial court found that because the claims of each class member were, as discussed above, highly individualized, "there was no single event or course of conduct that can be applied to all of the class representatives." In doing so, the court reasoned that "there are simply too many different factual circumstances involved in these claims to show that the claims presented by the class representatives are typical of the claims of the remaining members of the class." We again find no clear error in the trial court's conclusion in this regard.

As previously discussed, although plaintiffs' claim that Wal-Mart has been unjustly enriched arguably arises from a "common core of allegation," i.e., that it employs a practice or policy causing its employees to perform work off the clock or forgo rest and meal breaks to which they are entitled, the question whether it is inequitable for Wal-Mart to retain any benefit received as a result of a particular employee having performed work off the clock or missed a break varies with each individual class member. See *Falcon, supra* at 157 n 13 ("[t]he commonality and typicality requirements . . . tend to merge"); see also *Newton v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 259 F3d 154, 183 (CA 3, 2001) ("[t]he typicality inquiry . . . centers on whether the named plaintiffs' individual circumstances are markedly different"). Indeed, a named plaintiff who proves his or her claim will not necessarily have proven the claim of any other member of the proposed class and, as such, the trial court did not clearly err in finding that plaintiffs' claims were not typical of those of the "class at large," *Neal, supra*, and that, therefore, plaintiffs failed to meet the requirement of typicality set for in MCR 3.501(A)(1)(c). See *Sprague v Gen Motors Corp*, 133 F3d 388, 399 (CA 6, 1998) (summarizing the typicality requirement as entailing the premise that "as goes the claim of the named plaintiff, so goes the claim of the class").

4. Adequacy of Representative Parties

MCR 3.501(A)(1)(d) requires that "the representative parties will fairly and adequately assert and protect the interests of the class." To assess whether this requirement is met, a court must employ a two-part inquiry: "'First, the court must be satisfied that the named plaintiffs' counsel is qualified to sufficiently pursue the putative class action. Second, the members of the advanced class may not have antagonistic or conflicting interests.'" *Neal, supra* at 22, quoting *Allen, supra.*

In this case, although finding "no reason to challenge the competency" of plaintiffs' counsel to adequately represent the class, the trial court concluded that there exists an "inherent conflict" between the named plaintiffs and those members of the class who are hourly department managers, because such managers may in fact be the cause of another class member's complaint. In challenging the trial court's conclusion in this regard, plaintiffs argue that because they allege misconduct on the corporate, as opposed to department level, the conflict envisioned by the trial court simply does not exist. Plaintiffs' argument in this regard, however, ignores the statements of proposed class representatives such as Pamela Mackerway Lindsay Armantrout, and Kevan Jackson, each of whom recalled during their testimony having been asked by their department managers to perform work off the clock despite their knowledge that doing so was a clear violation of Wal-Mart policy. Given the disciplinary consequences for such conduct testified to by nearly every Wal-Mart employee who provided evidence in this matter, we reject plaintiffs' claim that the trial court erred by finding conflict where none exists. See also *Neal, supra* at 23 (finding that the potential for conflict between class members who competed for but were denied promotions, allegedly on the basis of race, properly supported a finding that the requirement of MCR 3.501(A)(1)(d) had not been satisfied).

5. Superiority

Finally, MCR 3.501(A)(1)(e) requires that "the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice." In deciding this factor, a court may consider the practical problems that can arise if the class action is allowed to proceed. *Dix v American Bankers Life Assurance Co of Florida*, 429 Mich 410, 414 n 6; 415 NW2d 206 (1987). "The relevant concern . . . is whether the issues are so disparate" that a class action would be unmanageable. *Lee v Grand Rapids Bd of Ed*, 184 Mich App 502, 504-505; 459 NW2d 1 (1989). Thus, as recognized by this Court in *Zine, supra*, the question whether a class action would be the superior form of suit is closely tied to the commonality factor because, "if individual questions of fact predominate over common questions, the case will be unmanageable as a class action." *Id.* at 289 n 14, citing *Lee, supra.* Recognizing this fact, the trial court here found that "the proposed class should not be certified because this is not a superior method of litigation, due to the seemingly vast amount of individualized inquiry that will be needed to prove the plaintiffs' claims," which the court found would render the proposed class action "unmanageable." In challenging the trial court's conclusion in this regard plaintiffs argue simply that, given the small nature of each individual class members claim in relation to the cost to litigate those claims, a class action is the superior method to resolve the claims at issue here. However, although the likely "negative value" of the individual suits is a "compelling rationale for finding superiority in a class action," *Castano v American Tobacco Co*, 84 F3d 734, 748 (CA 5, 1996), it is insufficient in and of itself to justify a "headlong plunge into an unmanageable and interminable litigation process" involving predominantly individual-specific issues, *Thompson v American Tobacco Co, Inc*, 189 FRD 544,

556 (D Minn, 1999) (citation and internal quotation marks omitted). See also *Allison v Citgo Petroleum Corp*, 151 F3d 402, 419 (CA 5, 1998) (predominance of individual-specific issues relating to the plaintiffs' claims detracts from the superiority of the class action device in resolving those claims). Here, the problems inherent in managing the proposed class action include the involvement of more than 96,000 potential plaintiffs spread across the state, who have worked or are currently working in more than forty different departments of eighty-five stores over a period of six years. Given these factors, we cannot conclude that the trial court clearly erred in finding that this matter would unmanageable and, therefore, not superior, as a class action suit. Consequently, we do not find that the trial court's denial of plaintiffs' motion for class certification was clearly erroneous. *Hamilton, supra.*

B. Cross-Appeal

1. Denial of Motion for Summary Disposition

Following the trial court's denial of plaintiffs' motion for class certification, Wal-Mart moved for summary disposition of plaintiffs' claims under MCR 2.116(C)(10). Wal-Mart argued, among other things, that because plaintiffs' claims for breach of an implied in law contract and unjust enrichment were equitable in nature, the availability of adequate remedies at law under both the federal Fair Labor Standards Act of 1938 (FLSA), 29 USC 201 *et seq.*, and the Michigan wages and fringe benefits act (WFBA), MCL 408.471 *et seq.*, precluded recovery under those theories. The trial court denied Wal-Mart's motion without addressing the applicability of the state and federal statutory remedies alleged by Wal-Mart to be available to plaintiffs in lieu of their equitable claims. On cross-appeal, Wal-Mart renews its assertion that summary disposition of plaintiffs' claims was appropriate on the ground that adequate remedies at law were available to plaintiffs. As explained below, we find such claim to be without merit, at least insofar as argued by Wal-Mart.

As previously discussed, Wal-Mart is correct that the claims asserted by plaintiffs are equitable in nature, *Tingley, supra*, and that equitable remedies are not appropriate where an adequate remedy at law is available, *Jeffrey v Clinton*, 195 Mich App 260, 263-264; 489 NW2d 211 (1992). With respect to the FLSA, Wal-Mart cites §§ 204, 211, and 216 of the act as authority for the proposition that the act applies and provides for enforcement of its provisions via "prompt administrative investigation, private rights of action, double damages, and attorneys' fees." See 29 USC 204, 211, and 216. Sections 204 and 211 of the FLSA, however, merely provide for the creation of a "Wage and Hour Division" within the United States Department of Labor, and grant authority to its representatives to "investigate such facts, conditions, practices, or matter as [they] may deem necessary or appropriate to determine whether any person has violated" the provisions of the act. See 29 USC 204 and 211. Moreover, although § 216(b) of the act provides for a private right of action against any employer that violates the minimum wage, 29 USC 206, or overtime, 29 USC 207, provisions of the act, it provides no such right of action for the claims asserted by plaintiffs, i.e., that, through a pattern or practice that caused its employees not to report all time worked or to forgo rest and meal breaks, Wal-Mart has been unjustly enriched by its employees. See 29 USC 216(b). As such, the FLSA does not, insofar as argued by Wal-Mart, provide plaintiffs with an adequate remedy at law precluding their equitable claims.

Regarding the WFBA, Wal-Mart cites §§ 481, 488 and 489 of the act as authority for the proposition that the act applies and provides for enforcement of its provisions via "prompt administrative investigation, private rights of action, double damages, and attorneys' fees." See MCL 408.481, 488, 489. Section 481 of the act provides that "[a]n employee who believes that his or her employer has violated this act may file a written complaint with the [Michigan] department [of labor] within 12 months after the alleged violation." MCL 408.481. Pursuant to § 488, the department may thereafter "order an employer who violates section 2, 3, 4, 5, 6, 7, or 8 [of the act] to pay" any wages due the employee, the amount of which may be doubled by the department "if the violation was flagrant or repeated." See MCL 471.488; see also MCL 408.472-473. Section 488(2) further provides for the imposition of attorney fees and other costs for violation of the act. MCL 408.488. However, with respect to the violations enumerated in § 488, none are even arguably applicable to the claims asserted by plaintiffs in this suit. To the contrary, the sections enumerated in MCL 408.488 concern only delineation of pay periods, MCL 408.472, payment of fringe benefits in accordance with a written contract or policy, MCL 408.473, the withholding of compensation due as a fringe benefit at termination of employment, MCL 408.474, payment of wages due at discharge, MCL 408.475, permissible methods for the payment of wages, MCL 408.476, permissible deductions from wages, MCL 408.477, and gratuities as a condition of employment, MCL 408.478. Consequently, there is no merit to Wal-Mart's assertion that summary disposition of plaintiffs' equitable claims was required on the ground that the WFBA and the FLSA provide adequate remedies at law.

B. Judgment in Favor of Plaintiff Kevan Jackson, Jr.

As previously noted, following denial of plaintiffs' motion for class certification, each of the originally named plaintiffs' individual claims were severed, and their respective cause of actions transferred to the counties in which the claim arose. Because his claims arose from employment at Wal-Mart's Saginaw store, plaintiff Kevan Jackson, Jr.'s claims remained in the Saginaw Circuit Court and were tried before the bench. At the conclusion of trial, the court issued an opinion and judgment awarding Jackson $539.14 as compensation for missed or shortened breaks and work performed by him off the clock.[8] On appeal, Wal-Mart challenges the trial court's award in this amount on the ground that the evidence at trial was insufficient to support any finding that the equities in this matter weighed in favor of Jackson. We disagree.[9]

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[8] In rendering this award, the trial court rejected as incredible Jackson's claims regarding having been locked either inside or outside the store at the beginning or end of shifts and, therefore, awarded Jackson nothing for these claimed times.

[9] Wal-Mart also argues that the trial court erred in awarding Jackson compensation for all missed or shortened rest break time evidenced by the time card punch exception report summary submitted by Jackson at trial, which it further asserts erroneously calculates a portion of such time. However, these arguments are not preserved for appellate review because Wal-Mart failed to include these issues in its statement of questions presented. See MCR 7.212(C)(5); *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003). Consequently, we decline to consider these arguments. *Busch, supra.*

Where, as here, the proceeding was equitable in nature, this Court reviews the trial court's ultimate determination de novo and reviews for clear error the findings of fact supporting that determination. *Webb v Smith*, 224 Mich App 203, 210; 568 NW2d 378 (1997). A trial court's findings are clearly erroneous only where, although there is evidence to support those findings, this Court is left with a definite and firm conviction that a mistake has been made. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004); see also MCR 2.613(C). This Court will defer, however, to the trial court's superior ability to judge the credibility of the witnesses. *Glen Lake, supra.*

As previously discussed, to be successful Jackson's claims for breach of an implied in law contract and unjust enrichment required that he establish that Wal-Mart received a benefit from him that it would be inequitable for the company to retain without compensation to Jackson. *Tingley, supra*; see also *Lewis, supra*. In arguing that the evidence proffered at trial failed to meet this required showing, Wal-Mart cites its provision of a procedure for employees to request that their time be adjusted to reflect work performed but not otherwise recorded, of which Jackson acknowledged he was aware but failed to use to inform Wal-Mart of the missed or shortened breaks and off-the-clock work at issue in this case. Wal-Mart asserts that, in the face of such evidence, any conclusion that it would be unjust or otherwise inequitable for it to retain the benefits it may have received as a result of Jackson's claimed uncompensated work is clearly in error. Wal-Mart's argument in this regard, however, ignores the basic premise of the inequity claimed in this suit and supported by the testimony of organizational behavior expert William Cooke, i.e., that the business strategy employed by Wal-Mart, in conjunction with the corporate culture expressly fostered by the company, resulted in a work environment wherein employees were compelled to perform work off the clock and to forgo rest and meal breaks. Indeed, Cooke testified that Wal-Mart employees would do so without "a second thought," because it was simply a part of the culture in which they worked. Given this premise and the testimony in support thereof, we do not find the trial court's award inequitable under the circumstances of this case, despite the knowing existence of procedures purportedly set in place to prevent such inequity.

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray

B

Supreme Court of Alabama.
Ex parte MASONITE CORPORATION and International Paper Company.
(Re Judy NAEF, et al.
v.
MASONITE CORPORATION, et al.).
Ex parte MASONITE CORPORATION.
(Re Judy NAEF, et al.
v.
MASONITE CORPORATION, et al.).
1950962, 1951093 and 1950963.

June 28, 1996.

Manufacturers petitioned for writ of mandamus directed to the Mobile Circuit Court, No. CV-94-4033,Robert G. Kendell, J., and for permission to appeal seeking extraordinary review of preliminary matters in a class action. The Supreme Court, Almon, J., held that: (1) trial judge's communications with plaintiffs' attorney to facilitate drafting of order certifying class was not an improper ex parte communication, and (2) notice by publication was appropriate in national class action.

Petition for permission to appeal denied and petitions for writ of mandamus denied.

Hooper, C.J., filed an opinion concurring in part and dissenting in part.

Maddox, J., filed an opinion concurring in the result in part and dissenting in part.

Houston, J., filed an opinion concurring in the result in part and dissenting in part.

West Headnotes

[1] Judges 227 ⚷ 11(2)

227 Judges
227I Appointment, Qualification, and Tenure
227k11 Removal or Discipline
227k11(2) k. Standards, Canons, or Codes of Conduct, in General. Most Cited Cases
Communications between judge and one party's counsel to facilitate drafting of order did not constitute ex parte communications prohibited by Rules of Professional Conduct and Canons of Judicial Ethics, where judge had reached a firm decision before telephoning attorney and gave opposing party full opportunity to argue its assertion of prejudice when it called to his attention that he had forgotten to send opposing party a copy of order before entering it, and judge had held an extensive class certification hearing and had received briefs from both sides before he decided to certify class. Rules of Prof.Conduct, Rule 3.5(b); Canons of Jud.Ethics, Canon 3(A)(4).

[2] Parties 287 ⚷ 35.44

287 Parties
287III Representative and Class Actions
287III(B) Proceedings
287k35.43 Notice and Communications
287k35.44 k. In General. Most Cited Cases
Notice by publication was appropriate in national class action where identities of class members could not be ascertained. Rules Civ.Proc., Rule 23(c)(2).

[3] Parties 287 ⚷ 35.69

287 Parties
287III Representative and Class Actions
287III(C) Particular Classes Represented
287k35.69 k. Tort Cases; Environmental Interests; Mass or Toxic Tort. Most Cited Cases
Trial judge's preliminary decision to hold initial trial in products liability action on single issue of whether siding was defective did not render order certifying a class improper in complex product liability class action.

[4] Appeal and Error 30 ⚷ 69(1)

30 Appeal and Error
30III Decisions Reviewable
30III(D) Finality of Determination
30k67 Interlocutory and Intermediate Decisions
30k69 Nature or Form of Action or Proceeding
30k69(1) k. In General. Most Cited Cases
Appellate courts do not review preliminary orders in class actions absent compelling reasons to do so.

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***1069** Warren B. Lightfoot,Mac M. Moorer and Lee M. Hollis of Lightfoot, Franklin & White, L.L.C., Birmingham, and Sandy Robinson of Cabaniss, Johnston, Gardner, Dumas & O'Neal, Mobile, for all petitioners.
Steven J. Harper and Richard C. Godfrey of Kirkland & Ellis, Chicago, IL, for Masonite Corporation.
Robert T. Dorman of McRight, Jackson, Dorman, Myrick & Moore, Mobile, and Elizabeth J. Cabraser, Michael F. Ram, Christine J. Anderson and Jonathan D. Selbin of Lieff, Cabraser, Heimann & Bernstein, San Francisco, CA, for Respondents.
ALMON, Justice.
These petitions, all seeking extraordinary review of preliminary matters in a class action, are due to be denied. The action seeks damages based on alleged defects in exterior siding manufactured by the Masonite Corporation. Masonite's petitions for the writ of mandamus and for permission to appeal seek to have the class certification set aside, the circuit judge recused, and the plaintiffs' attorneys disqualified, all on the basis of contacts between the circuit judge and the plaintiffs' attorneys that Masonite asserts were improper.

> FN1. International Paper Company is also a defendant and a petitioner by virtue of its having purchased the Masonite Corporation. We shall refer to the two petitioners collectively as "Masonite."

The allegations of improper *ex parte* contacts are not substantiated by the materials before us. At the hearing on class certification, the circuit judge, Judge Robert G. Kendall, told the parties that, when he decided whether to grant class certification, he would notify the prevailing party and ask that party to draft a proposed order. Masonite did not object to this proposed procedure. After the judge decided to certify the class, the communications between the judge or his staff and the attorneys or their employees were the barest minimum necessary to notify the plaintiffs that the court had decided to certify the class and to effectuate the drafting of the certification order.

> FN2. Despite Masonite's allegations of "numerous" ex parte contacts, the evidence was that the only time Judge Kendall actually spoke to the plaintiffs' attorney was when he first asked for the order to be drafted. According to the attorney, that conversation lasted about two minutes. The other communications either were relayed through staff or consisted of the delivery back and forth of the first and second draft of the order.

The plaintiffs filed their complaint in December 1994 and amended it in January 1995. Discovery and briefing on whether to certify a class proceeded from March through October 1995. A full hearing was held on class certification on October 16, 1995, at which Masonite presented expert ***1070** testimony and the attorneys for both sides argued at length for and against certification of a nationwide plaintiff class of owners of residences with Masonite siding. At the conclusion of the hearing, Judge Kendall stated:
"I have a considerable amount-additional amount of thinking to do. What I think now I propose to do is to when I reach a conclusion ask one side or the other to prepare an order for me, and I will do that without bothering the nonprevailing side, and put that in whatever form I like, and then circulate it to both sides."

On November 6, Judge Kendall notified Richard T. Dorman, one of the plaintiffs' attorneys, that he had decided in favor of class certification. One or two days later, Mr. Dorman had his secretary call the judge's office to ask whether to certify subclasses, and the answer came back, "No." A draft of the order was sent with a short cover letter, and the judge made changes and sent the order back. Someone in Mr. Dorman's office telephoned the judge's office and asked whether to send a copy of the order to the defendants and was told not to. The finished order was then delivered to Judge Kendall. Out of these events, Masonite counts 11 "*ex parte* " communications.

[1] On November 15, 1995, Judge Kendall signed the order certifying the class. Later that day, and apparently without notice or knowledge that Judge Kendall had certified the class, Masonite filed a petition for removal to a federal court. On the plaintiffs' motion, the federal court remanded the cause in late January or early February 1996. On February 7, Masonite filed a motion to vacate the certification of the plaintiff class, asserting that the communications between the judge and Mr. Dorman to facilitate the drafting of the order had constituted *ex parte* communications, which are prohibited by Rule 3.5(b) of the Alabama Rules of Professional Conduct and Canon 3(A)(4) of the Alabama Canons of Judicial Ethics.

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We note that footnote 2 of Masonite's February 7 motion to vacate states:

"The Alabama Canons of Judicial Ethics and the ABA Code of Judicial Conduct also condemn *ex parte* communications and require that courts not consider or permit *ex parte* communications. *These provisions specifically apply to requests for and submissions of proposed findings or orders and require that the party contacted to submit same notify the other parties so they are given the opportunity to respond to the proposed order.* (Alabama Canons of Judicial Ethics, Canon 3(A)(4).) (ABA Model Code of Judicial Conduct, Canon 3(B)(7) and Commentary.)"

(Emphasis added.) Canon 3(A)(4) of the Alabama Canons does not "specifically" apply to such proposed findings or orders. The American Bar Association adopted a new Model Code in 1990. Canon 3(A)(4) of Alabama's Canons of Judicial Ethics is substantially the same as Canon 3(A)(4) of the 1972 ABA Code of Judicial Conduct. In both our Canons and the ABA's 1972 Code, Canon 3(A)(4) and its commentary are silent as to requests for, or submissions of, proposed findings or orders.

The 1990 version of the ABA's model canon on *ex parte* communications is Canon 3(B)(7). The commentary to that rule includes this statement: "A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions."

As we view these petitions, Masonite's challenge to the certification order reduces to a complaint that it was not given a copy of the order before Judge Kendall signed it. This oversight was redressed by the fact that, in response to Masonite's motion to vacate, Judge Kendall scheduled a hearing on the matter, which was held on February 14. The hearing opened with these remarks:

"Mr. Lightfoot: Your Honor, I'm Warren Lightfoot from Birmingham. We say that the Court's order on class certification is due to be vacated, number one, because the procedures that Your Honor outlined at the close of the hearing on October 16 were not followed. Specifically Your Honor said that you would call on one side or the other to prepare an order and that that order would be circulated to both sides before any entry of an order.

***1071** "The Court: All right. What happened there was ... I simply forgot that I had said that I would do the second stage of that, which was circulate the order after the Court had approved it and I apologize for that. How is your client aggrieved in that regard?

"Mr. Lightfoot: Well, I was going to tell you other reasons why it should be vacated.

"The Court: All right. Well, are you going to answer that question first?

"Mr. Lightfoot: Yes, sir, I do. Under the cases cited by counsel for the plaintiff, [*In re*] Colony Square [Co., 819 F.2d 272 (11th Cir.1987)] in particular, that's an 11th Circuit case.... That case says that orders drafted solely by one side without being seen by the other side are inherently defective. That they are inappropriate, that there is overwhelming opportunity for overreaching and exaggeration and that they don't necessarily reflect the opinions of the Court, that they may reflect the opinions of counsel, and that that procedure is condemned and they go on to say how it's to be rectified. The case law says that. We are prejudiced by having counsel for the plaintiff submit its words to the Court."

Mr. Lightfoot continued in the same vein, arguing generally and in the abstract that the practice of allowing prevailing counsel to draft proposed opinions and orders raises an appearance of impropriety. He never described any portion of the order that Masonite would have objected to if it had been given a copy of the order before Judge Kendall signed it. Mr. Dorman then took the stand and described the process by which the order was drafted; one of his partners then gave further testimony. At the conclusion of this testimony, Mr. Lightfoot said he would like a week to consider whether to file a motion asking Judge Kendall to recuse and to disqualify the plaintiffs' lawyers. The attorneys then argued further issues not here pertinent.

On February 23, Masonite filed a motion asking Judge Kendall to recuse and a motion to disqualify the plaintiffs' counsel, supported, among other things, by affidavits from Prof. Steven Lubet of Northwestern University School of Law and Prof. William G. Ross of Cumberland School of Law. Masonite later filed an affidavit of Prof. Geoffrey C. Hazard, Jr., of the University of Pennsylvania and Yale University, and other materials in support of its motion.

In response, the plaintiffs submitted, among other things, the affidavits of two respected members of the Bar of this state, former Chief Justice C.C. Torbert and the late Circuit Judge Joseph Phelps, and the declaration of another respected Bar member, former

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Circuit Judge Joseph A. Colquitt. They expressed unequivocal opinions that the drafting of the order certifying this action as a class action complied with the Canons of Judicial Ethics, the Rules of Professional Conduct, and the usual and customary practice in this state. Chief Justice Torbert's affidavit includes the following:

"I, like many lawyers and commentators, am concerned about the current willingness of some parties to litigation to wrongfully attack conscientious, ethical and well-qualified judges in [an] attempt to gain advantage for themselves. I have known Judge Robert Kendall for many years and know him to be a judge of intelligence and integrity. Based upon the evidence I have seen, he is now the victim of an unjustified attack. Based upon my review of the record in this case, I have seen no evidence that Judge Kendall is biased or prejudiced in favor of or against either party in this matter. Indeed, it appears that Judge Kendall has gone to great lengths to allow both parties to present their positions in full and to rule fairly and objectively. Whether or not I would agree with all of Judge Kendall's rulings is irrelevant. In my opinion there is no basis for the recusal or disqualification of Judge Kendall or the disqualification of the lawyers for the plaintiffs.

"....

"As Chief Justice of the Alabama Supreme Court and head of the Administrative Office of Courts, I became keenly aware of the pressures faced by trial judges-such as Judge Kendall-in Alabama. It is likely that all of them would ***1072** prefer to have caseloads and staff that would allow them to prepare, type and finalize all orders that they enter. As a practical matter, that is not feasible. Consequently, as every practicing lawyer in Alabama knows, many trial judges frequently ask the lawyers for the prevailing side on an issue to 'prepare an order' consistent with the views taken by the judge after hearing the facts and the evidence. The appellate courts of this state have expressly found that delegating the preparation of an order as was done in this case is not inappropriate and has been common practice in the state for many judges. *See, e.g.,* Stollenwerck v. Talladega County Board of Education, 420 So.2d 21, 23-24 (Ala.1982).

"In this case, when Judge Kendall announced on the record and in open court his intention to have the prevailing party prepare an order there were no objections-probably because the parties realized there was nothing *per se* wrong with such a procedure. It was only after finding out that the Court had ruled in favor of class certification that objections were raised and ethical violations charges made."

Judge Phelps stated in his affidavit, in support of his "strong opinion that there was no ethical breach by the lawyers or Judge Kendall in this case [and that] [c]ertainly, there is no basis for recusal or disqualification of Judge Kendall or the lawyers":

"Ideally, trial judges would have the resources and time to prepare their own orders based upon the evidence and the law presented to them. However, based upon my education and experience, I can state that the practicalities of expeditiously processing the volume of cases presented to judges do not allow those judges to always do their own clerical work in producing the orders they have decided should be entered. It is common practice in many circuit courts in Alabama for the judge to read the briefs, listen to the evidence, hear oral argument, and then ask the prevailing party to prepare an order which conforms with the decision the judge has made. In this case, Judge Kendall made clear to all parties at the October 16, 1995, hearing that he intended to utilize that procedure. No objection to the procedure [was] voiced by either side. The fact that there was no objection probably evidences that all the lawyers were aware that this was common practice and simply not objectionable. I believe that the procedure followed by Judge Kendall is an acceptable alternative to the common practice of having both sides present proposed orders to the court."

Judge Colquitt's declaration includes the following specific points that refute Masonite's arguments for setting aside the class certification because of the alleged *ex parte* communications:

"The real issue to be decided is whether those communications as they occurred justify or require that the class-certification order be vacated, the Judge recuse himself, and Plaintiffs' counsel be disqualified from representing the Plaintiffs. The plain answer is no, the Defendants have failed to establish by the evidence that Judge Kendall is biased or prejudiced against the Defendants, and his conduct in this case would not lead a reasonable person to so conclude. This conclusion is supported by the following facts:

"a. Judge Kendall announced at the end of the hearing on October 16, 1995, that after he decided whether to certify a class, he would

" 'ask one side or the other to prepare an order for me, and I will do that without bothering the nonprevailing side, and put that in whatever form I like, and then circulate it to both sides.'

"Defendants' counsel thus had notice of what was to

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occur. They voiced no objection to the proposed procedure, and for [all that] appears would have been willing to entertain a request from the Court that they 'prepare an order' denying the Plaintiffs' request for class certification. The 'pattern of communication' and 'exclusion' of the opposing side from the drafting process objected to by Defendants' witnesses would have occurred whichever side the Judge called if the Judge followed his plan. The Judge's decision to exclude the ***1073** nonprevailing party was announced by the Judge at the hearing and was known to both sides. The Defendants should not be permitted to stand by and await the outcome of the Judge's deliberations before deciding whether to object to the announced procedure.

"b. Before calling Mr. Dorman, according to the evidence in this case Judge Kendall had reached a decision on the class certification issue. As Mr. Dorman sought clarification on the issue of subclasses, Judge Kendall ruled against Mr. Dorman on subclasses. This fact hardly suggests bias, prejudice and partiality on the part of the Judge.

"c. Courts, particularly state courts, are faced with growing caseloads of increasing complexity. Frequently they face time standards, limited budgets, inadequate staffs and insufficient supplies. In Alabama, judges are to reduce delay and dispose of pending litigation. Yet the typical judge moves from one hearing to the next often without a recess. Complex orders in complicated cases frequently are drafted by attorneys, many times at the request of the judge after the judge has heard both sides and decided the issue to be made the subject of the order.

"d. Although a 'better' procedure might have been followed, the facts of this case do not justify virtually the most drastic remedies available, namely recusal of the Judge and disqualification of Plaintiffs' chosen counsel. The communications in this case are not substantial. The evidence fails to show a hidden collusion or conspiracy. The Judge did what he announced that he would do-with one exception: After putting the proposed order in the form he wanted, he did not circulate a copy of the proposed order before he signed it. This failure to circulate the order does not create a clear appearance of impropriety or bias. In fact, Professor Lubet, Defendants' witness, notes that 'I do not mean, of course, that Judge Kendall has been or will be intentionally biased, or that his rulings have been other than in good faith.' Similarly, Defendants' witness Professor Ross noted that '[n]othing in this affidavit should be construed to impugn Judge Kendall's integrity or his good faith in this case.' "

Except in one respect, Judge Kendall followed the procedure he announced at the conclusion of the hearing on class certification. That one deviation from the announced procedure was the judge's failure to give the defendants' attorneys a copy of the order before he signed it. When the judge was reminded that he had said he would give both sides a copy of the order before signing it, he called a further hearing and invited the parties to object to any provisions of the order. The defendants objected to the certification of the class, but did not suggest any revision to the order. Any harm that may have occurred from the judge's failing to follow the earlier-announced plan of allowing review of a proposed order after it had been drafted by the prevailing party was cured by the hearing at which the defendants were given the opportunity to object to any portions of the order they deemed to be incorrect or inappropriate.

FN3. The dissent erroneously states that Judge Kendall "also told the parties that he would hear arguments about this proposed order once it had been drafted and delivered." 681 So.2d at 1086. Judge Kendall simply said that he would "circulate it to both sides."

The affidavits by Chief Justice Torbert and Judge Phelps and the declaration by Judge Colquitt show that these respected members of our Bar reviewed the pertinent materials and concluded that nothing improper occurred. We agree with these former circuit judges and this former Chief Justice of this Court that the circuit judge and the plaintiffs' attorneys have engaged in no unethical conduct and no conduct creating an appearance of impropriety.

This conclusion is supported by the reported appellate cases. In *Stollenwerck v. Talladega County Board of Education*, 420 So.2d 21 (Ala.1982), this Court held that the circuit court's adoption of an order containing what the appellant called "extensive findings of fact," prepared by the defendant's attorney, did not violate Rule 52(a), Ala. R. Civ. P., which pertains to findings of fact by the trial court:

***1074** "We find no prohibition in [Rule 52(a)] which would forbid the delegation by a trial court to the prevailing attorney of the task of preparing a proposed order which includes findings of fact based upon the evidence in the case. Although this Court has never ruled on the propriety of the practice of trial judges' allowing or requesting counsel for the

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prevailing party to prepare findings, the basic view by many jurisdictions which have considered the matter is that such practice is not improper. 54 A.L.R.3d 868 (1974). In fact, *no* reported case has been found in which the objection has met with actual success at the appellate level. *Id.*, at 870. The practice of having the prevailing attorney draw up an order is not uncommon in federal courts. *See, e.g., Miller v. Tilley*, 178 F.2d 526 (8th Cir.1949). Therefore, the decree prepared by the attorney, but adopted by the trial judge as the court's decree, is due to be affirmed."

420 So.2d at 23-24 (emphasis original; footnote omitted). In *Medical Arts Clinic, P.C. v. Henry*, 484 So.2d 385 (Ala.1986), this Court, while disapproving of an *ex parte* communication, held that it did not constitute reversible error.

More recently, the Court of Civil Appeals has found no error in a "trial court's request for the parties to 'draft an appropriate decree' ":

"It has been a long-standing practice in this state and elsewhere for trial judges to delegate the manual preparation of judgments to others. Frequently, as in this case, one or more parties draft a proposed judgment, which the trial court may accept or reject, in part, or in its entirety. So common is this practice that legal research books used in the practice of law frequently provide forms suggesting proposed orders.

"In the case sub judice, soon after the trial court's request to *both* parties to prepare a draft of an appropriate order, the employer provided the employee with a proposed judgment and sought suggestions. Apparently, the employee chose not to respond to the trial court's request, not to respond to the employer's request for suggestions regarding the proposed order, and not to object to the employer's proposed order.... Other jurisdictions have considered this practice acceptable on the basis that the proposed or draft judgment presented by an attorney has no legal effect until signed by the trial court. See, for example, *Johnson v. Johnson*, 67 N.C.App. 250, 313 S.E.2d 162 (1984), and *In re Crane's Estate*, 343 Ill.App. 327, 99 N.E.2d 204 (1951). In many cases, the preparation of a proposed judgment is customarily delegated to the winning attorney. See *Johnson, supra.* Thus, there was simply no error in the trial court's delegation of the task of preparing a draft judgment in accordance with its findings."

Boothe v. Jim Walter Resources, Inc., 660 So.2d 604, 607 (Ala.Civ.App.1995) (emphasis original).

The Supreme Court of the United States has disapproved "the Fourth Circuit's suggestion that 'close scrutiny of the record in this case [was] justified by the manner in which the opinion was prepared,' ... that is, by the District Court's adoption of petitioner's proposed findings of fact and conclusions of law.... [O]ur previous discussions of the subject suggest that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 571-72, 105 S.Ct. 1504, 1510-11, 84 L.Ed.2d 518 (1985) (citation omitted).

In two recent cases, the United States Court of Appeals for the Eleventh Circuit has found no reversible error where proposed orders were drafted by attorneys in whose favor the judges had ruled. *In re Colony Square Co.*, 819 F.2d 272 (11th Cir.1987), *cert. denied*, 485 U.S. 977, 108 S.Ct. 1271, 99 L.Ed.2d 482 (1988); *In re Dixie Broadcasting, Inc.*, 871 F.2d 1023 (11th Cir.), *cert. denied*, 493 U.S. 853, 110 S.Ct. 154, 107 L.Ed.2d 112 (1989). *See also Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d 960 (5th Cir.1975). In *Colony Square*, the bankruptcy judge had communicated with the creditor's attorney on several occasions requesting orders, without the debtor's knowledge. The Court of Appeals found no error, ***1075** based principally on two facts: the judge had "already reached a firm decision before asking Alston & Bird to draft the proposed orders," 819 F.2d at 276, and "[s]econd, Colony has had ample opportunity to present its arguments," 819 F.2d at 277. Both of these facts are present here-Judge Kendall had reached a firm decision before telephoning Mr. Dorman (indeed, he ruled against the plaintiffs on their requests for certification of a non-opt-out Rule 23(b)(1) or (b)(2) class and for certification of subclasses), and he gave Masonite a full opportunity to argue its assertion of prejudice when it called to his attention that he had forgotten to send it a copy of the order before entering it.

With all due respect to the law professors who have executed affidavits in support of Masonite's motions, we observe that they have not taken into account several aspects of the case. First and foremost, they fail to consider the fact that Judge Kendall had held an extensive class certification hearing and had received briefs from both sides before he decided to certify the class. They also give too little weight to the February 14 hearing, held after Masonite had made its motion to vacate, at which Masonite was able to point to no provisions in the order that might

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have been overwritten, exaggerated, or otherwise distorted or that were erroneous by virtue of the drafting by the plaintiffs' attorneys without notice to the defendants. They also fail to take into account the fact that a certification order is inherently interlocutory, conditional, and subject to revision or complete decertification if, as the case develops, countervailing considerations arise. We see no sign that they have taken into account the rigorous schedule of a trial court's docket. Seven of the Justices of this Court are former circuit judges and are well aware of the necessity of assistance such as was provided by the attorneys in this case. Of the résumés of these three law professors, only Prof. Ross's shows any significant experience in the private practice of law.

Frankly, we find it somewhat unusual for officers of the court to seek recusal under these circumstances. When given the opportunity at the February 14 hearing to present their objections to the court's order, defense counsel did not suggest any revision of the order or cite any change they would have suggested if the order had been sent to them before it was executed, other than to change the result of certifying the class.

For the foregoing reasons, we hold that there is no basis for further review of the petitioner's allegations of improper *ex parte* communications.

[2] To the extent that these petitions challenge the notice procedure as not complying with *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), the petitions do not show any clear error and do not present a question appropriate for review under Rule 5, Ala. R.App. P. *Shutts* and Rule 23(c)(2), Ala. R. Civ. P., require only "the best notice practicable under the circumstances." Notice by publication has been approved in national class actions where the identities of the class members cannot be ascertained. *In re Domestic Air Transportation Antitrust Litigation,* 141 F.R.D. 534, 548 (N.D.Ga.1992); *Jordan v. Global Natural Resources, Inc.,* 104 F.R.D. 447, 448 (S.D.Ohio 1984). The dissent addresses the question whether *Shutts* would be violated by an application of Alabama law to all of the plaintiffs' claims, but Judge Kendall has not even ruled on the choice of law question yet.

[3][4] Similarly, there is no merit to the argument that Judge Kendall's order is due to be set aside on the basis that he has made a preliminary decision to hold an initial trial on the single issue of whether the siding is defective. Initial trials on a single issue, such as whether a particular product is defective, have been approved in complex product liability class actions. *Jenkins v. Raymark Indus., Inc.,* 109 F.R.D. 269 (E.D.Tex.1985), *aff'd,* 782 F.2d 468, *reh'g denied,* 785 F.2d 1034 (5th Cir.1986); *Central Wesleyan College v. W.R. Grace & Co.,* 6 F.3d 177 (4th Cir.1993); *In re School Asbestos Litigation,* 789 F.2d 996 (3d Cir.1986), *cert. denied sub nom. Celotex Corp. v. School Dist. of Lancaster,* 479 U.S. 852, 107 S.Ct. 182, 93 L.Ed.2d 117 (1986); *Arthur Young & Co. v. United States District Court,* 549 F.2d 686 (9th Cir.), *cert. denied,* ***1076**434 U.S. 829, 98 S.Ct. 109, 54 L.Ed.2d 88 (1977); *In re Copley Pharmaceutical, Inc., 'Albuterol' Products Liability Litigation,* 161 F.R.D. 456 (D.Wyo.1995). Furthermore, Judge Kendall's order is preliminary, and appellate courts do not review preliminary orders in class actions absent compelling reasons to do so. *First Alabama Bank of Montgomery, N.A. v. Martin,* 381 So.2d 32 (Ala.1980), *appeal after remand,* 425 So.2d 415 (Ala.1982), *cert. denied,* 461 U.S. 938, 103 S.Ct. 2109, 77 L.Ed.2d 313 (1983); *Ex parte Central Bank of the South,* 675 So.2d 403 (Ala.1996).

For the foregoing reasons, the petition for permission to appeal is denied, and the petitions for the writ of mandamus are also denied.

1950962-WRIT DENIED.

1950963-PETITION FOR PERMISSION TO APPEAL DENIED.

1951093-WRIT DENIED.

SHORES, KENNEDY, INGRAM, COOK, and BUTTS, JJ., concur.
HOOPER, C.J., concurs in part and dissents in part.
MADDOX and HOUSTON, JJ., concur in the result in part and dissent in part, with separate writings.HOOPER, Chief Justice (concurring in part and dissenting in part).
I agree with the majority that there is insufficient evidence of bias on the trial judge's part to justify recusal. However, I must dissent from the denial of the petition for the writ of mandamus sought on the basis of improper class certification under Rule 23, Ala. R. Civ. P. This case involves a nationwide class of perhaps three million members and the laws of many states other than Alabama. "Alabama does not have the power ... to punish [a defendant] for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on [a defendant] in order

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to deter conduct that is lawful in other jurisdictions." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); see also *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir.1996). I would at least order an answer and briefs to determine if questions of law or fact are common to the class. Therefore, I concur as to the recusal issue, but I must respectfully dissent from the denial of the petition for permission to appeal and the denial of the petitions for the writ of mandamus.

MADDOX, Justice (concurring in the result in part and dissenting in part).

The petitioners, Masonite Corporation and International Paper Company, raise two issues in their mandamus petition and their motion to stay the trial proceedings: 1) whether the trial court erred in certifying a national class action pursuant to Rule 23(a) and (b)(3), Ala. R. Civ. P., and 2) whether the trial judge erred in refusing to recuse, in light of the petitioners' allegations that the trial judge and counsel for the plaintiffs engaged in improper *ex parte* communications in drafting the class certification order.

Although I concur in the result of the majority's opinion as to the recusal issue, without accepting the language contained therein addressing this issue, I must respectfully dissent from the majority's denial of the petition for the writ of mandamus and the denial of the motion to stay, because I believe the petitioners have put forth sufficient evidence to warrant this Court's ordering an answer and briefs.

FACTS

The respondents filed a class action against Masonite Corporation and others, alleging that hardwood siding sold by the defendants was inherently defective and that the defendants had systematically misled their customers about the product. The proposed class includes all persons affected by any of this siding sold after 1980. The defendants note that since 1980 over 5 billion board feet of this siding has been installed in over 3 million structures in all 51 jurisdictions included in the class action pleadings.

The trial judge, pursuant to the plaintiffs' motion, certified the action against these defendants as a national class action; as a result, the petitioners say, there is a putative ***1077** class of over 3 million plaintiffs. I am attaching the class certification order of the trial judge as Appendix A to this special opinion.

I agree with the petitioners' assertion that they have shown that the trial judge erred in certifying this action as a national class action. They say the trial judge erred because: 1) he impermissibly failed to address and resolve the choice of law issues, in violation of both Rule 23 and the United States Constitution; 2) he authorized a national class action where there are no predominant common questions of law or fact; and 3) he constructed a class that is neither superior nor manageable.

Rule 23(a), Ala. R. Civ. P., addresses the initial requirements that must be present in order for a trial judge to certify a class action:

FN4. It should be noted that Rule 23 of the Alabama Rules of Civil Procedure is identical to Rule 23 of the Federal Rules of Civil Procedure.

"(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."

(Emphasis added.) After a plaintiff has shown that the prerequisites of Rule 23(a) have been met, the trial court then must look to Rule 23(b), in order to determine what type of class action will be maintained; only after the plaintiffs have satisfied the pertinent portion of Rule 23(b) may the trial judge certify the action as a class action. The trial judge in this case found that the plaintiffs' claims mainly concerned monetary relief, so he certified the class pursuant to Rule 23(b)(3), which reads:

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

"....

"(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

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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."

(Emphasis added.)

In arguing that the requirements of Rule 23 have not been met in this case, the petitioners raise two important points: 1) that the application of Alabama law to all plaintiffs in this case would violate their constitutional rights to due process; and 2) that even if the trial judge allows the jury to consider liability by applying the separate tort laws of the 51 different jurisdictions, litigation of this class action would not only violate the law as expressed in Rule 23, but would also violate their constitutional rights to due process. I will discuss each of these arguments separately.

I.

The petitioners first argue that this national class certification violates both Rule 23 and the United States Constitution because, they argue, the certification order is in direct conflict with the United States Supreme Court's decision in *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). The petitioners argue that because fewer than 1% of the potential plaintiffs live in Alabama, application of Alabama tort law to the entire class violates their constitutional right to due process as outlined in *Shutts,* ***1078** because the potential plaintiffs reside in all 51 jurisdictions and these jurisdictions do not share common tort laws; thus, they say allowing a class action means Masonite could be held liable under Alabama law to all plaintiffs, even though particular plaintiffs might reside in a jurisdiction whose law would not allow a recovery.

I believe the petitioners have sufficiently shown that this certification order may violate the mandate of *Shutts.* I realize, of course, that the majority has written extensively, citing cases, and that it distinguishes *Shutts,* but it does so without the benefit of an answer and briefs; but I would not deny the writ before I heard from both sides, especially in view of the due process concerns presented and in view of the fact that recent two federal cases, which have been decided since this petition was filed, have addressed the same issues raised by the petitioners. Upon review of these cases and the class certification order, I believe that the issues raised by the petitioners relating to the certification of a national class action clearly show that this lawsuit may implicate many federal constitutional rights.

FN5. The majority seems to criticize the petitioners for filing a petition for extraordinary relief, as if it were frivolous. I do not think it is frivolous, especially in view of what the United States Supreme Court said in *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), about the principles of state sovereignty and comity that forbid a State from enacting policies for the entire Nation or imposing its own policy choice on neighboring states. Class certifications that have extraterritorial application to customers of a national manufacturer could come within the "safe harbor" concept alluded to in that decision. In other words, corporate executives of Masonite and International Paper could reasonably have interpreted the relevant statutes and laws of other States as establishing safe harbors for the sale and distribution of their products, without fear of product liability lawsuits.

In *Shutts,* where the facts were remarkably similar to the facts of this present case, the United States Supreme Court held that a party's due process rights are violated where a state court applies its own law in a class action proceeding and the state does not have "significant contacts or a significant aggregate of contacts to the claims asserted by *each member of plaintiff class.*" (Emphasis added). *Shutts,* 472 U.S. at 821, 105 S.Ct. at 2979. Important in the *Shutts* decision, in my opinion, was the fact that both Texas and Oklahoma had different laws concerning the computation of mineral royalties. *Id.* at 814-22, 105 S.Ct. at 2975-80. The United States Supreme Court held in *Shutts* that application of Kansas law in that national class action violated the defendant's *federal constitutional right to due process;* the Court explicitly stated that the issue presented in *Shutts* was one of federal constitutional law, which would preempt any state action that would violate that right. *Id.* at 821-22, 105 S.Ct. at 2979-80.

FN6. *Shutts* dealt with a class action suit, certified in Kansas state court, where the plaintiffs claimed the defendant had

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impermissibly withheld certain oil royalties. The plaintiff class numbered 33,000 and had representatives from all 51 jurisdictions; less than 1% of the class members lived in Kansas and only one quarter of 1% of the gas leases involved in the lawsuit were on Kansas land. *Shutts,* 472 U.S. at 801, 105 S.Ct. at 2968.

I believe the majority mistakenly interprets the holding of *Shutts* by stating that "*Shutts* ... require[s] only 'the best notice practicable under the circumstances.' " 681 So.2d at 1075. I read the holding of *Shutts* differently. Chief Justice Rehnquist, in announcing the decision of the Court in *Shutts,* stated the constitutional requirements as follows:

"Kansas must have a 'significant contact or sufficient aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of Kansas law is not arbitrary or unfair. Given Kansas' lack of 'interest' in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, *we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits.*

"When considering fairness in this context, an important element is the expectation of the parties. There is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas*1079 law would control. Neither the Due Process Clause nor the Full Faith and Credit Clause requires Kansas 'to substitute for its own [laws], applicable to persons and events within it, the conflicting statute of another state,' but Kansas 'may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.' "

Id. at 821-22, 105 S.Ct. at 2979-80. (Emphasis added; citations omitted.) It is this holding in *Shutts* that convinces me that the petitioners have sufficiently shown that they are entitled to the extraordinary relief they seek. Because the petitioners have shown that over 99% of the potential plaintiffs live outside the State of Alabama, and because the record presently fails to show that Alabama has sufficient contacts with each of the potential plaintiffs to apply its law to all claims asserted by the class, I would like to have the trial judge's response to the petitioners' argument before he proceeds further with the class action. From the facts, as I view them now, it would seem apparent that the certification order violates the rule of *Shutts.* If Masonite and the other defendants are held liable to all 3 million plaintiffs under Alabama's tort laws, there could be no question that their constitutional rights have been violated.

FN7. Mandamus review of a trial court's certification order is within this Court's power and is utilized to cure defects in a class certification order. *See, Ex parte Central Bank of the South,* 675 So.2d 403 (Ala.1996); *Ex parte Blue Cross & Blue Shield of Alabama,* 582 So.2d 469 (Ala.1991).

II.

This class certification order seems to violate the spirit and purpose of Rule 23. In order to ensure that the petitioners' constitutional rights to due process are not violated, the trial court would be required to apply the tort laws of all other 50 jurisdictions in determining Masonite's liability in this national class action. Although I am aware that the trial judge has not made his ruling concerning the law to be applied, it is apparent from the record here that *Shutts* forbids the application of Alabama law to the entire class; therefore, the trial judge's only option would be to apply the different tort laws from the other 50 jurisdictions-but to do so would violate the spirit and purpose of Rule 23. Rule 23(a)(2) states that a class action may be maintained only where "there are questions of law or fact common to the class." Further, Rule 23(b)(3) requires a class action be "superior to other available methods for the fair and efficient adjudication of the controversy."

There is recent support for my position that the class certification order here could violate the petitioners' due process rights. While this petition was pending, the United States Court of Appeals for the Fifth Circuit, in *Castano v. American Tobacco Co.,* 84 F.3d 734 (5th Cir.1996), decertified a class action brought in a federal court, on the basis that the provisions of Rule 23(a) and Rule 23(b)(3) had not been satisfied. In *Castano,* the Fifth Circuit held that the trial judge had abused his discretion in certifying a national products liability class action against seven tobacco companies, in a factual situation remarkably similar to the factual situation on which this present action is based. Important to the court's determination that the class action could not be maintained was the fact that before certifying the class the trial judge had not considered the variations in the tort laws of the 50 different jurisdictions. The

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court also held that the trial judge erred in certifying the class in regard to numerous fraud claims; the court said the reliance element of a fraud claim eliminates "common issues of fact or law." The court held that the trial judge's determination of manageability was likewise erroneous.

Although I was aware of the *Castano* decision as soon as it was released, the petitioners have filed a supplemental brief in which they correctly point out that the underlying facts of this present class suit are remarkably similar to the facts presented in *Castano.* For example, in this case, the representative plaintiffs have asserted the following claims against Masonite: fraudulent suppression, fraudulent misrepresentation, breach of express and implied warranties, products liability, and negligence. In *Castano* the plaintiffs asserted claims for: "fraud and deceit, ***1080** negligent misrepresentation, ... negligence and negligent infliction of emotional distress, violation of state consumer protection statutes, breach of express warranty, breach of implied warranty, [and] strict product liability." 84 F.3d at 737. In both of these case, the trial judge certified a national class action, pursuant to Rule 23, without conducting a jurisdictional survey concerning the variations in differing state tort laws.

The Fifth Circuit's opinion in *Castano* is persuasive not only because of the similarities between the two cases, but because this Court has held, in *Bracy v. Sippial Electric Co. Inc.*, 379 So.2d 582 (Ala.1980), that federal cases interpreting the Federal Rules of Procedure are authority in the construction of the Alabama Rules of Civil Procedure; therefore, *Castano* is binding authority.

I realize, of course, that a trial judge has broad discretion in certifying a class action and that this Court will not by writ of mandamus act to undo a class certification except upon a clear showing that the trial judge abused his discretion in certifying the class. I believe that in this case-a case that has many constitutional implications-the learned trial judge has failed to follow federal precedents, and I believe the writ of mandamus would be appropriate to remedy the judge's abuse of discretion.

The reasons for my conclusion are: First, the trial judge failed to rule on what law would be applied in this action before he certified the class. Second, the trial judge erred in determining that the class is manageable. Third, the trial judge erred in ruling that the class certification satisfies the Rule 23(b)(3) requirement of "predominance" and "superiority." I will discuss these issues in the order in which that I have just stated them.

A.

Although the trial in this class action is scheduled to begin within 90 days, and could begin as early as August 19, 1996, the trial judge has not ruled on which law will be applied in this action. The majority erroneously believes that the failure of the trial judge to rule on this important issue does not affect the determination of whether certification of this national class action was proper. However, this ruling is crucial to determining the validity of the class certification in the first instance. As I have previously discussed, under *Shutts* Alabama law cannot be applied to all the claims asserted by the national class without violating the petitioners' federal constitutional right to due process. Consequently, now that the trial judge has made the crucial initial decision on certification of a national class, it follows that the only option available to the trial judge is to apply the differing tort laws from all 51 jurisdictions. The Fifth Circuit held in *Castano* that the failure of the trial judge to make a ruling on the choice of law issue required that the class be decertified; I would make a similar holding in this case. Due process at least requires that a class defendant know the scope of what that defendant must defend against.

> FN8. Although the majority states that this order is a "conditional" class certification, a review of the trial judge's certification order shows that the class was conditionally certified on February 3, 1995. A review of Appendix A, the November 15, 1995, class certification order, shows this order to be a final order.

In his class certification order, the trial judge stated that "if the Court concludes that the law of a single state cannot, consistent with Alabama's choice of law rules, be applied to one or more of plaintiffs' claims, the Court is not persuaded that the variations in applicable state laws are so significant as to create predominant legal issues." *See,* Appendix A, 681 So.2d at 1090. There are two significant points to be raised from this ruling: 1) it is apparent that the trial judge, in making this ruling, has failed to rule on which law will be applied in this national class action, and 2) the trial judge has stated that the variation in different tort laws is not "so significant as

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to create predominant individual issues." Although it is not apparent from the record, it appears that the trial judge has not yet undertaken a jurisdictional survey concerning the differing laws of our sister jurisdictions. In my opinion, serious consideration of either of these points by the majority would require decertification, because***1081** the law seems clear that "[i]n a multi-state class action, variations in state law may swamp any common issues and defeat predominance." Castano, 84 F.3d at 741. *See*, Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir.1996). As I read the federal decisions addressing national class actions, a trial court must consider variations in state law before certifying a class action, where the law of one jurisdiction cannot be constitutionally applied to all claims. *See, Georgine; Castano;* *In re American Medical Systems, Inc.*, 75 F.3d 1069 (6th Cir.1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 516 U.S. 867, 116 S.Ct. 184, 133 L.Ed.2d 122 (1995), *Grady v. Rhone-Poulenc Rorer Inc.*, --- U.S. ----, 116 S.Ct. 184, 133 L.Ed.2d 122 (1995); *Walsh v. Ford Motor Co.*, 807 F.2d 1000 (D.C.Cir.1986), *cert. denied*, 482 U.S. 915, 107 S.Ct. 3188, 96 L.Ed.2d 677 (1987); *Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309 (5th Cir.1978). In fact, in *Castano* the Court of Appeals for the Fifth Circuit concisely articulated the requirement that a trial judge make a ruling regarding the law to be applied before certifying a class action pursuant to Rule 23(b)(3).
"A [trial] court's duty to determine whether the plaintiff has borne its burden on class certification requires that a court consider variations in state law when a class action involves multiple jurisdictions. 'In order to make the findings required to certify a class action under Rule 23(b)(3) ... one must initially identify the substantive law issues which will control the outcome of the litigation.' *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 316 (5th Cir.1978)."

84 F.3d at 741.

The plaintiffs, and apparently the majority of this Court, believe that the fact that the trial judge has failed to rule on-much less conduct a jurisdictional survey regarding-the applicable law is a minor point, having no bearing on the validity of the class certification order and is a matter that can be decided later. That apparently is not the law, as interpreted by the federal cases I cite above.

As Judge Harry T. Edwards and then Judge Ruth Bader Ginsberg wrote for the District of Columbia Circuit Court of Appeals:
"Appellees see the 'which law' matter as academic. They say no variations in state warranty laws relevant to this case exist. A [reviewing] court cannot accept such an assertion 'on faith.' Appellees, as class action proponents, must show that it is accurate. We have made no inquiry of our own on this score, and, for the current purpose, simply note the general, unstartling statement made in a leading treatise: 'The Uniform Commercial Code is not uniform.' "

Walsh v. Ford Motor Co., 807 F.2d at 1016. As Judge Edwards and Judge Ginsberg wrote, "the 'which law' matter" is not purely "academic." The trial judge's determination-or lack thereof-of the "which law" issue is crucial, and in this case the trial judge's failure to make that determination before certifying this as a national class action was error. The remedy would be for this Court to at least require an answer from the trial judge and order that the parties brief the more recent federal decisions touching the issue. In holding that the national class action must be decertified, the Court in *Castano* stated:"The [trial] court's consideration of state law variations was inadequate. The survey provided by the plaintiffs failed to discuss, in any meaningful way, how the court could deal with variations in state law.... Nothing in the record demonstrates that the court critically analyzed how variations in state law would affect predominance."

84 F.3d at 743. Similarly, the trial judge in this case has not considered the variations in the tort laws of our sister jurisdictions. Based on the fact that *Shutts* prohibits the application of Alabama tort law in this action and the fact that the trial judge has not even conducted a jurisdictional survey on the differing laws, it appears to me that the petitioners have made at least a prima facie showing that this national class action was not properly certified.

***1082** B.

There is another reason why we should require an answer and briefs. The trial court failed to consider how the variation in different tort laws would affect the Rule 23 "manageability" requirement. In the certification order the trial judge stated:
"Masonite argues that the class treatment of this action would be unmanageable, and the court should deny class certification on this basis. While the Court acknowledges that the task of managing this action will require the Court's time, attention and supervision, it finds that the case is manageable and that this Court is capable of managing it.... [T]he Court is persuaded that the selection and application

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of appropriate substantive laws ... will be manageable."

See Appendix A, 681 So.2d at 1090. I believe that the manageability of the action is intricately tied to the "which law" question. I cannot understand how the trial judge concluded that the class action would be manageable, absent a sufficient determination of what laws will be applied in this action, because the analysis and application of different tort laws to the petitioners on claims asserted by the various class plaintiffs, 99% of whom reside in jurisdictions other than Alabama, have great bearing on whether this case will be manageable. The *Castano* court seems to agree with this analysis, for it held that "[t]he [trial] court also failed to perform its duty to determine whether the class action would be manageable in light of state law variations." Castano, 84 F.3d at 743. Basically, the *Castano* court held that a trial court cannot rule that a national class action is manageable, without determining the applicable laws and considering how the different laws will affect manageability. "In summary, whether the specter of millions of cases outweighs any *manageability problems in this class is uncertain when the scope of any manageability problems is unknown*." Castano, 84 F.3d at 744. (Emphasis added.)

Although the trial judge has ruled that the class action is manageable, this ruling seems unpersuasive when viewed in light of the fact that the trial judge has not considered state law variations. The trial judge's assurance that the class is manageable must be considered in light of the fact that so many of the operative facts upon which this determination was made are disputed; when it is so considered, it is obvious that the judge made the factual determination of manageability of this national class action without sufficiently considering the choice of law issue and its effect on the determination.

C.

There is another reason why I believe that this Court should require an answer and briefs before allowing this class action to proceed. It appears to me that the trial court erred in determining that the plaintiffs satisfied the predominance requirement of Rule 23(b)(3). In ruling that the predominance requirement had been satisfied, the trial court wrote:
"To predominate, common issues must constitute a significant part of individual class members' cases. Where, as here, a common course of conduct has been alleged arising out of a common nucleus of operative facts, common question predominate. Jury findings *on common questions of fact and Court rulings on common issues of law will significantly advance the resolution of identical or substantially similar questions and issues which would require resolution in connection with individual claims.*
" ... Accordingly, the Court finds that [the] plaintiffs have satisfied the predominance requirement of Rule 23(b)(3)."

(Emphasis added; citations omitted.) In making this determination, the trial court, and the majority of this Court in its opinion, relied on *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), and a Fifth Circuit case, *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir.1986). However, in *Castano*, the Fifth Circuit discussed both of the cases relied on by the majority, and specifically stated that neither *Eisen* or *Jenkins* can be used in determining whether the predominance requirement has been satisfied in a national class action alleging fraudulent conduct, where laws of different jurisdictions would be ***1083** applied. *Castano* states in clear terms that where a class action is based on fraud, which normally requires a plaintiff to prove reliance, a national class action cannot be certified unless all plaintiffs in the action can show that they relied on the same conduct and that the conduct induced them to purchase the product:

> FN9. The Fifth Circuit in *Castano* commented on the applicability of *Jenkins*, which is also a Fifth Circuit case, to national tort class actions:
> "The *Jenkins* court, however, was not faced with managing a novel claim involving eight causes of action, multiple jurisdictions, millions of plaintiffs, eight defendants, and over fifty years of alleged wrongful conduct. Instead, *Jenkins* involved only 893 personal injury asbestos cases, the law of only one state, and the prospect of a trial occurring only in one district. Accordingly, for purposes of the instant case, *Jenkins* is largely inapposite."
> 84 F.3d at 744.

"A [trial] court certainly may look past the pleadings to determine whether the requirements of rule 23 have been met. Going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive

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law in order to make a meaningful determination of the certification issues. *See, Manual for Complex Litigation* § 30.11 (3d ed.1995).

"The [trial] court's predominance inquiry demonstrates why such an understanding is necessary. The premise of the court's opinion is a citation to *Jenkins* and a conclusion that class treatment of common issues would significantly advance the individual trials. Absent knowledge of how addiction-as-injury cases would actually be tried, however, it was impossible for the court to know whether the common issues would be a 'significant' portion of the individual trials. The court just assumed that because the common issues would play a part in every trial, they must be significant. *The court's synthesis of* Jenkins *and* Eisen *would write the predominance requirement out of the rule, and any common issue would predominate if it were common to all the individual trials.*

"The court's treatment of the fraud claim also demonstrates the error inherent in its approach. According to both the advisory committee's notes to Rule 23(b)(3) and this court's decision in *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880 (5th Cir.1973), a fraud class action cannot be certified when individual reliance will be an issue. The [trial] court avoided the reach of this court's decision in *Simon* by an erroneous reading of *Eisen;* the court refused to consider whether reliance would be an issue in individual trials."

Castano, 84 F.3d at 745. (Emphasis added; footnotes omitted.) It appears to me that the trial court's error here is the same as the error addressed in *Castano.* How can the trial court here determine liability for multiple counts of fraud in a national class action when the crucial issue of reliance, which is highly dependent on the circumstances of each individual transaction, is a crucial factor in a majority of the claims asserted by the class? How can this conclusion be reached in this case where the facts relating to the knowledge and reliance issues vary from claimant to claimant? As the petitioners argue in their supporting briefs:"Plaintiff Mosley bought his home knowing Masonite siding was installed, but the fact made no difference in his decision to purchase [the home]. This was true for plaintiff Bradshaw as well.

"Plaintiff Stauffer is a current owner who purchased from a prior owner who had received a settlement from Masonite-and knew when he purchased from the prior owners that there had been a siding problem.

"Plaintiffs Brining, Loumakis and Naef never saw an advertisement for Masonite before acquiring any interest in the house that is now the subject of the claim here.

"Plaintiff Loumakis had no involvement in the plans for her Masonite-sided home, or the materials used to construct it, or even any idea what kind of siding was on her home when she bought it.

"Plaintiffs Mosley and Stauffer admit that Masonite never made any fraudulent statements to them. Plaintiffs Brining, Loumakis, Stauffer, Bradshaw and Murphy were exposed to no Masonite advertising***1084** and saw no other Masonite representations.

"Plaintiffs Mosley and Naef admitted to the complete absence of reliance on any Masonite representation in purchasing their homes. And Plaintiff Murphy knew when the house was purchased that Masonite's warranty reimbursement program provided for a formula based on the 'cost of the board' itself."

If there are this many variations between the representative plaintiffs concerning the circumstances in which they received Masonite siding, and if the element of reliance is a fact-based question dependent on each individual independent transaction, how could the trial court find that there existed such predominant issues necessary for certifying a national class action? How could this ruling be made in light of the fact that there are possibly three million more plaintiffs, each of whom bought a Masonite product in a separate independent transaction? Further, how can one justify the "predominance" finding in light of the state law variations concerning the requisite standards for showing reliance, especially where a trial court has made no jurisdictional survey in relation to the varying state tort laws for the determination of liability for fraudulent conduct?

I believe that *Castano,* the committee comments to Federal Rule 23, and the present fact situation show why a national class action asserting liability for fraudulent conduct cannot satisfy the predominance inquiry, especially where a trial court would be required by *Shutts* to apply the various state tort laws. Therefore, I believe that the trial judge abused his discretion in finding that common questions of law and fact predominate over questions involving only individual members.

D.

The trial judge also ruled in his class certification order that certification of a national class action

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would satisfy the Rule 23 requirement that the class proceeding be "superior to other available methods for the fair and efficient adjudication of the litigation."

"In determining whether the class action device is superior here, this Court must consider what other procedures, if any, exist for disposing of the dispute before it. The most obvious, *and perhaps only,* alternative to a class action is to remit the Class members to the institution of individual actions. The Court finds that class treatment of this action is far more favorable than the individual adjudication of even a small fraction of the Class members' claims. The Court finds that in the absence of class certification, it is probable that many claims would not be pursued because litigation costs would be prohibitive, and because many Class members would never know of their potential claims. *The use of the class device in this action will serve the goals of economies of time, effort and expense by preventing the same issues from being litigated and adjudicated in multiple courts throughout the country.*"

(Emphasis added.) Although the trial judge is correct in thinking that often the possibility of numerous separate lawsuits asserting the same issue of liability against a defendant may be a basis for certifying a class action, this possibility is not the controlling rationale for certifying a class action. The court in *Castano* was faced with a similar ruling entered by the trial judge, i.e., a finding of superiority based on the fact that the class mechanism would be superior to individual actions involving similar claims. The Court said:"The [trial] court's rationale for certification in spite of such problems-i.e., that a class trial would preserve judicial resources in the millions of inevitable individual trials-is based on pure speculation. Not every mass tort is asbestos, and not every mass tort will result in the same judicial crises. The judicial crisis to which the [trial] court referred to is only theoretical."

84 F.3d at 747. The concern for judicial economy is not so great in cases where fraud is asserted, because in fraud cases individual trials tend to be a superior method for determining liability. The *Castano* court addressed this issue:"Individual trials will determine whether individual reliance will be an issue. Rather***1085** than guess that reliance may be inferred, a [trial] court should base its determination that individual reliance does not predominate on the wisdom of such individual trials. The risk that a [trial] court will make the wrong guess, that the parties will engage in years of litigation, and that the class will ultimately be decertified (because reliance predominates over common issues) prevents this class action from being a superior method of adjudication."

84 F.3d at 749. Further, "[t]he complexity of the choice of law inquiry also makes individual adjudication superior to class treatment," especially when the class certification is premature because of the failure of the trial court to make a jurisdiction survey of the various tort laws. *Id.* at 749-50. A premature class certification may violate a defendant's right to due process, because "[p]remature certification deprives the defendant of the opportunity to present that argument [the predominance argument] to any court and risks decertification after considerable resources have been expended." *Id.*

Additionally, the fact that the trial judge has ruled that the class action trial will be separated into different "phases" raises questions as to the superiority of the class action and also implicates the right to a jury trial. "The Seventh Amendment entitles parties to have fact issues decided by one jury, and prohibits a second jury from reexamining those facts and issues." *Castano,* 84 F.3d at 750. The United States Constitution prohibits multiple juries from determining a defendant's liability where the juries would consider common issues of law and fact, and the risk of decertification after trial implicates the right to due process. *In re Rhone-Poulenc Rorer, Inc.,* 51 F.3d 1293 (7th Cir.), cert. denied, 516 U.S. 867, 116 S.Ct. 184, 133 L.Ed.2d 122 (1995); *Alabama v. Blue Bird Body Co., Inc.,* 573 F.2d 309 (5th Cir.1978). Although the trial judge has ruled only that the first stage of the litigation will involve a determination as to whether this siding is defective, that ruling does not negate the possibility that the petitioners' jury trial rights will be violated, especially in light of the fact that the trial court will be required to apply laws of different jurisdictions, many of which have adopted theories of comparative negligence. The *Castano* opinion clearly articulates this concern:

"Severing a defendant's conduct from comparative negligence results in the type of risk that our court forbade in *Blue Bird.* Comparative negligence, by definition, requires a comparison between the defendant's and the plaintiff's conduct. *Rhone-Poulenc,* 51 F.3d at 1303 ('Comparative negligence entails, as the name implies, a comparison of the degree of negligence of plaintiff and defendant.'). At a bare minimum, a second jury will rehear evidence of the defendant's conduct. There is a risk that in apportioning fault, the second jury could

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reevaluate the defendant's fault, determine that the defendant was not at fault, and apportion 100% of the fault to the plaintiff. In such a situation, the second jury would be impermissibly reconsidering the findings of a first jury. The risk of such reevaluation is so great that class treatment can hardly be said to be superior to individual adjudication."

84 F.3d at 751. Based on what the court said in *Castano,* I believe the trial judge erred in determining that a national class action in this matter would be superior to other methods of adjudication.

Based on the foregoing, I must respectfully disagree with the majority in its refusal to require the respondent trial judge to file an answer and a brief relating to the issues I have raised in this dissent.

III.

Although I concur in the result reached by the majority on the recusal issue, I do want to comment about statements made concerning counsel's filing of this petition. I reviewed extensively the petitioners' claims that the trial judge should disqualify himself; by concurring in the result on the recusal issue I should not be understood as agreeing with any statement in the majority opinion that would classify the petition here as frivolous. Although I recognize that the practice of trial judges in Alabama to frequently ask the attorneys on one side to draft a proposed order, I believe that trial judges should be careful to make sure that the other party or ***1086** parties receive notice of the proposed order and an opportunity to object or respond. I do not suggest any bad faith on the part of any attorney representing any of the parties in this case. Although I agree that the petitioners have not shown an entitlement to a writ of mandamus on the recusal issue, I do not think their claim is frivolous. It was only after I fully considered the evidence they filed, and the legal arguments they advanced, that I was persuaded to concur in the result on the recusal issue. I realize, of course, that both the plaintiffs and the trial judge claim this petition is a frivolous attack and claim that this mandamus proceeding is intended to delay the trial and the ultimate resolution of the defendants' liability; I do not see it in this light, especially considering the fact that this action involves a class of potentially 3 million plaintiffs and the further fact that two federal courts have recently held, in comparable factual situations, that the trial judge erred in certifying a class action.

IV.

Rule 1 of the Alabama Rules of Civil Procedure states, in part, that the Rules should "be construed to secure the just, speedy and inexpensive determination of every action" upon its merits. This trial will be long, complicated, and expensive; expensive not only to the parties in the action, but expensive to the State. I believe it would be in the best interests of justice and fairness to at least order an answer and briefs so that we could examine the issues in more detail, because I believe them to be meritorious.

Class actions, properly utilized, can conserve judicial time and resources, but class actions can also raise serious concerns regarding due process and can often subject defendants to what has been termed "blackmail settlements." Class actions often place immense pressure on defendants to settle, considering the "all or nothing" nature of class action verdicts. *See,* *Matter of Rhone-Poulenc Rorer, Inc.,* 51 F.3d at 1298-99; Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

I do not pass judgment on the merits of this class action, but in view of what this Court said in *Bracy v. Sippial Electric Co.,* 379 So.2d 582 (Ala.1980)-that federal cases interpreting the Federal Rules of Civil Procedure are authority for interpreting the Alabama Rules of Civil Procedure-I believe the Fifth Circuit, in *Castano,* correctly decided several of the issues raised in this mandamus petition. I would require the respondent judge to file an answer and brief, and, unless convinced that the issues the court addressed in *Castano* were materially different from those presented in this case, I would issue the writ of mandamus and decertify the class.

APPENDIX A

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Judy Naef, et al., Plaintiffs,

vs.

Masonite Corporation, et al., Defendants.

Civil Action No. CV-94-4033

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ORDER CERTIFYING PLAINTIFF CLASS

Plaintiffs have moved for an order, pursuant to Rules 23(a)(1)-(4) and (b)(1)-(3) of the Alabama Rules of Civil Procedure, certifying a plaintiff class of all individuals and entities owning property in the United States on which Masonite hardboard siding manufactured since January 1, 1980 has been installed. The Court has considered the legal memoranda and documentary and testimonial materials submitted by the parties. The Court has also considered the oral arguments of counsel for the parties made during the October 16, 1995 hearing on plaintiffs' motion. For the reasons stated below, plaintiffs' motion is GRANTED pursuant to Rules 23(a)(1)-(4) and (b)(3).

FACTUAL BACKGROUND

The named plaintiffs are alleged to own property on which hardboard siding manufactured by defendants Masonite Corporation and/or International Paper Company (together "Masonite") since January 1, 1980 has been installed. Plaintiffs allege that, due to its defective design, Masonite hardboard siding is subject to moisture invasion problems, ***1087** and that as a result of this defect, the siding swells, buckles, and prematurely rots, deteriorates and fails, thereby causing damage to property on which this siding is installed. Plaintiffs further allege that since at least 1980 Masonite has failed to disclose its knowledge of the design defect, and, in fact, has actively concealed this information from them and from the public. Plaintiffs further allege that through substantially uniform written advertisements in national consumer and professional publications, and in substantially uniform written warranties, Masonite falsely represented and warranted that its hardboard siding was not defective and was durable, sturdy, and designed for installation in all weather conditions and climates, including moist environments. Plaintiffs allege that Masonite's conduct is violative of consumer protection statutes and gives rise to liability for fraudulent suppression, fraudulent misrepresentation, breach of expressed and implied warranties and negligence. Plaintiffs seek compensatory and punitive damages and other relief.

The named plaintiffs' allegations and claims against Masonite are brought on their own behalf and on behalf of a proposed plaintiff class of all individuals and entities owning property in the United States on which Masonite hardboard siding manufactured since January 1, 1980 has been installed (the "Class" or "Masonite Class"). The named plaintiffs also allege claims on their own behalf and on behalf of proposed subclasses against defendant Stacy's Cash & Carry Building Materials, Inc., Ace Hardware, Inc., Scotty's Homebuilder's Supply, Inc. and Mobile Lumber & Building Materials, Inc. (the "Wholesaler/Retailer Defendants").

The Court conditionally certified the Masonite Class in an order dated February 3, 1995. In that order, the Court directed that following the completion of class certification discovery, the Court would receive additional briefs and arguments on the propriety of class certification in this action. After approximately seven months of discovery, the parties submitted lengthy and thorough legal memoranda, as well as numerous documents and deposition transcripts. In addition, at the Court's request, the parties submitted testimony by legal experts on class action issues. On October 16, 1995, the Court heard extensive oral argument from counsel for the parties. Finally, at the Court's direction, counsel submitted post-hearing letter briefs concerning questions raised by the Court during the hearing. After review and consideration of all of these materials, the Court finds that class action treatment of plaintiffs' claims against Masonite is appropriate under Rules 23(a)(1)-(4) and (b)(3).

DISCUSSION

A. ***General Standards***

Determination of plaintiffs' motion for class certification is committed to the sound discretion of this Court. *Ex parte* Gold Kist, Inc., 646 So.2d 1339, 1341 (Ala.1994). Plaintiffs, however, bear the burden of establishing that the requirements of Rule 23 have been met. *Ex parte Blue Cross & Blue Shield of Ala.*, 582 So.2d 469, 477 (Ala.1991). In determining whether plaintiffs have satisfied their burden, the Court assumes as true the substantive allegations of plaintiffs' Amended Complaint. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 163 (1974); *In re Copley Pharmaceutical, Inc.*, 158 F.R.D. 485, 489 (D.Wyo.1994). Although inquiry into the merits of the case is not appropriate in making the class certification decision (*Eisen*, 417 U.S. at 178; *Ex parte* Gold Kist, Inc., 646 So.2d at 1343), the Court may consider documents or testimony bearing on the

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Rule 23 elements of class certification. In this matter, both parties have submitted, and the Court has considered, substantial documentary and testimonial materials they contend support their respective positions.

Rule 23 of the Alabama Rules of Civil Procedure sets forth the prerequisites to all class actions in this state. The requirements of Rule 23(a) are as follows: (1) the class is so numerous that joinder of all members individually 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 ***1088** represent the interests of the class. Ala.R.Civ.P. 23(a)(1)-(4).

FN1. Rule 23 of the Alabama rules is identical to Rule 23 of the Federal Rules of Civil Procedure. "Cases interpreting the Federal Rules of Civil Procedure are authority in the construction of the Alabama Rules of Court Procedure." *Bracy v. Sippial Elec. Co.*, 379 So.2d 582, 584 (Ala.1980). Federal cases interpreting and applying Federal Rule 23 are therefore cited and discussed herein as if interpreting and applying Alabama's Rule 23.

After demonstrating that the Rule 23(a)(1)-(4) requirements are satisfied, plaintiffs must also satisfy the elements enumerated in Rule 23(b)(1), (2) or (3). *Ex parte* Gold Kist, Inc., 646 So.2d at 1341. The Court finds that the requirements of Rule 23(b)(1) and (2) are not here met. At issue, then, is whether plaintiffs have demonstrated 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 the other available methods for the fair and efficient adjudication of the controversy." Ala.R.Civ.P. 23(b)(3). The Court will first analyze the Rule 23(a) requirements and later discuss the Rule 23(b)(3) prerequisites.

B. *Rule 23(a) Requirements*

1. *Numerosity.*

The first requirement of Rule 23(a), numerosity, is satisfied if the proposed class is so numerous that joinder of all members is impracticable. Ala.R.Civ.P. 23(a)(1). "Impracticable" does not mean "impossible." Plaintiffs need only show that it would be extremely difficult or inconvenient to join all members of the Class. *Bradley v. Harrelson*, 151 F.R.D. 422, 426 (M.D.Ala.1993); 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, Civil 2d at § 1762. The precise number and identity of class members need not be shown for certification of the class; good faith and common sense estimates of the number of class members suffice. *See, e.g., Id.; Ash v. Board of Electricians and the City of New York*, 124 F.R.D. 45, 47 (E.D.N.Y.1989).

The numerosity requirement is satisfied in this action. Although the exact number of Class members is not known at this time, plaintiffs estimate that the Class may consist of at least hundreds of thousands of persons. Masonite believes the Class may include millions of homeowners. Classes of this size satisfy the Rule 23(a) numerosity requirement. 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, Civil 2d at § 1762.

2. *Commonality.*

The second element of Rule 23(a), commonality, is satisfied if one or more common questions of fact or law affect all or a substantial number of the Class members. Ala.R.Civ.P. 23(a)(2); *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (5th Cir.1986). The provision does not require that all the questions of law and fact raised by the complaint be common. *In re Copley*, 158 F.R.D. at 489; 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, Civil 2d at § 1763.

The Court finds that there are common issues of fact present in this action, which may include, but are not limited to, whether Masonite hardboard siding was defectively designed; whether Masonite intentionally, recklessly or negligently failed to disclose and concealed its knowledge that the siding was defective; whether Masonite intentionally, recklessly or negligently misrepresented the nature, quality, performance, or characteristics of its hardboard siding; and whether Masonite conspired with other manufacturers of hardboard siding for the purpose of concealing information about the nature, quality and performance characteristics of the siding. There are also common issues of law applicable to the several factual claims. The Court finds that

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plaintiffs have made the required showing of commonality under Rule 23(a)(2).

3. *Typicality.*

The third element of Rule 23(a), typicality, requires that plaintiffs demonstrate that the claims of the Class representatives are typical of the claims of the entire Class. Ala.R.Civ.P. 23(a)(3). The named plaintiffs' claims are typical if they arise from the same event, practice, or course of conduct that ***1089** forms the basis of the Class claims, and if they are based on the same or substantially similar legal theories. *Appleyard v. Wallace,* 754 F.2d 955, 958 (11th Cir.1985); *Jenkins,* 782 F.2d at 472. The typicality requirement does not require that the Class representatives' claims be identical to those of the Class members. *Id.*

The Court finds that the Class representatives' claims arise from the same alleged course of conduct of Masonite and are based upon the same legal theories as those of the absent Class members. The Court finds that typicality is established because the Class representatives must prove the same elements to establish their causes of action that the absent Class members would need to prove to prevail if they brought individual claims against Masonite. The Court recognizes that, depending on the resolution of the choice of law questions, there may be variations in the law applicable to the claims of Class members. That the named plaintiffs and members of the Class may have suffered varying degrees of injury and damage does not defeat typicality. *Appleyard,* 754 F.2d at 958; *Jenkins,* 782 F.2d at 472; *Bradley,* 151 F.R.D. at 426-27; Wright, Miller & Kane, *Federal Practice and Procedure,* Civil 2d at § 1764. Similarly, the existence of alleged affirmative defenses does not defeat typicality. *Ex parte Gold Kist, Inc.,* 646 So.2d at 1342; *Rishcoff v. Commodity Fluctuations Sys. Inc.,* 111 F.R.D. 381, 382 (E.D.Pa.1986). Accordingly, the typicality requirement of Rule 23(b)(3) is satisfied.

4. *Adequate Representation.*

The final requirement of Rule 23(a) is that the Class representatives and counsel representing the Class be able fairly and adequately to protect the interests of all members of the Class. Ala.R.Civ.P. 23(a)(4). Satisfaction of this rule requires that the representative plaintiffs' interests not be antagonistic to those of the Class, and that the representative parties' attorneys be qualified, experienced, and generally able to conduct the litigation. *Jenkins,* 782 F.2d at 472; *Jordan v. Swindall,* 105 F.R.D. 485, 488 (N.D.Ala.1985).

The Court finds that the named plaintiffs' interests are co-extensive and not in conflict with the interests of the Class members, and that the representative plaintiffs will fairly and adequately represent and protect the interests of all Class members. The Court has no reason to conclude that the representative plaintiffs will not prosecute this action vigorously, and take seriously their commitment to bear the responsibilities of serving as representative plaintiffs for the Class. Each of the named plaintiffs has testified at deposition and has responded to written discovery requests for the benefit of the Class. Similarly, the Court finds that the named plaintiffs are represented by experienced and qualified counsel, who the Court believes will vigorously and adequately represent the Class.

For the foregoing reasons, the Court finds that plaintiffs have satisfied each of the four requirements of Rule 23(a).

C. *Rule 23(b)(3) Requirements*

After establishing that the requirements of Rule 23(a) have been met, plaintiffs must also satisfy one or more of the elements enumerated in Rule 23(b). Plaintiffs seek class certification pursuant to Rule 23(b)(3), which is appropriate if the Court finds that (1) common questions of fact or law predominate over individual questions, and (2) class treatment of plaintiffs' claims is superior to other available methods for the fair and efficient adjudication of the controversy. For the reasons stated below, the Court finds that both the predominance and superiority requirements are met in this case.

1. *Predominance.*

To predominate, common issues must constitute a significant part of individual class members' cases. *Jenkins,* 782 F.2d at 1472; *In re School Asbestos Litigation,* 104 F.R.D. 422 (E.D.Pa.1984), *aff'd in part, and vacated in part on other grounds,* 789 F.2d 996 (3d Cir.) *cert. denied,* 479 U.S. 852 (1986); Wright, Miller & Kane, *Federal Practice and Procedure,* Civil 2d at § 1778. Where, as here, a common course of conduct has been alleged arising out of a common nucleus of operative facts, common

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questions predominate. *Id.* Jury findings on common questions*1090 of fact and Court rulings on common issues of law will significantly advance the resolution of identical or substantially similar questions and issues which would require resolution in connection with individual claims.

That there may be difference in the degree of injury and damages suffered by individual Class members does not mean that individual issues predominate or that class certification is inappropriate. *In re General Motors Corp. Pick-up Truck Fuel Tank Litigation,* 55 F.2d 768, 817 (3d Cir.1995); *In re School Asbestos Litigation,* 789 F.2d 996, 1009-10 (3d Cir.1986); *In re Domestic Air Transportation Antitrust Litigation,* 137 F.R.D. 677, 692 (N.D.Ga.1991). Similarly, Masonite's alleged affirmative defenses do not present predominantly individual issues which preclude class certification in this action. *Ex parte Gold Kist, Inc.,* 646 So.2d at 1342; *Rishcoff,* 111 F.R.D. at 382. Further, if this Court concludes that the law of a single state cannot, consistent with Alabama choice of law rules, be applied to one or more of plaintiffs' claims, the Court is not persuaded that the variations in applicable state laws are so significant as to create predominant individual issues. *General Motors,* 55 F.3d at 818; *In re School Asbestos,* 789 F.2d at 1010. Accordingly, the Court finds that plaintiffs have satisfied the predominance requirement of Rule 23(b)(3).

2. *Superiority.*

Rule 23(b)(3) directs the Court to determine that a "class action is superior to other available methods for fair and efficient adjudication of the litigation." Ala.R.Civ.P. 23(b)(3). In determining whether the class action device is superior here, this Court must consider what other procedures, if any, exist for disposing of the dispute before it. The most obvious, and perhaps only, alternative to a class action is to remit the Class members to the institution of individual actions. The Court finds that class treatment of this action is far more favorable than the individual adjudication of even a small fraction of the Class members' claims. The Court finds that in the absence of class certification, it is probable that many claims would not be pursued because litigation costs would be prohibitive, and because many Class members would never know of their potential claims. The use of the class device in this action will serve the goals of economies of time, effort and expense by preventing the same issues from being litigated and adjudicated in multiple courts throughout the country.

The Court finds that a class action is the superior method of adjudicating this controversy for, among other reasons, those contemplated by Rule 23(b)(3)(A)-(D): (1) any interest of Class members in individually controlling the prosecution of separate actions is outweighed by the potential for the comprehensive and expedient resolution of this class action; (2) the number and type of individual lawsuits commenced by members of the Class have failed to result in relief to the overwhelming majority of the Class members; (3) it is desirable to concentrate the litigation in a single forum, to prevent repetitive pre-trial discovery, trial preparation and trial, and to avoid inconsistent adjudications; and (4) the Court foresees no insurmountable difficulties likely to be encountered in the management of this action.

Masonite argues that class treatment of this action would be unmanageable, and the Court should deny class certification on this basis. While the Court acknowledges that the task of managing this action will require the Court's time, attention and supervision, it finds that the case is manageable and that this Court is capable of managing it. The Court is persuaded that notice can be effectively communicated to members of the Class; that pre-trial discovery can be efficiently and expeditiously completed by the parties; and that all, or substantially all, of the controversy can be resolved through a multi-phased trial, if necessary. In addition, the Court is persuaded that the selection and application of the appropriate substantive laws to be applied to plaintiffs' claims and Masonite's defenses will be manageable.

For the foregoing reasons, the Court finds that plaintiffs have satisfied the predominance and superiority requirements of Rule 23(b)(3), and concludes that certification of ***1091** the Masonite Class is appropriate under Rules 23(a)(1)-(4) and (b)(3).

D. *Rules 23(b)(1)(A) And (2)*

In addition to moving for class certification under Rule 23(b)(3), plaintiffs seek certification under Rules 23(b)(1)(A) and 23(b)(2). These rules concern primarily claims for injunctive relief. Because the Court finds that plaintiffs' claims primarily are for monetary relief under Rule 23(b)(3), the Court finds certification under Rules 23(b)(1)(A) and (b)(2) inappropriate. Therefore, plaintiffs' motion for class

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certification under Rules 23(b)(1)(A) and (b)(2) is denied.

E. *Subclasses*

Plaintiffs originally moved for class action treatment for subclasses consisting of Class members whose Masonite siding was sold and/or distributed by one of the four Wholesaler/Retailer Defendants. Named plaintiffs Judy Naef, Mark Moseley, Gregory Stauffer, Joseph Bashaw and Henry Murphy contend that the siding installed on their respective properties was sold and/or distributed by one or the other of the Wholesaler/Retailer Defendants. The Court finds that creation of subclasses would not advance the interests of the Class and denies plaintiffs' motion for certification of the proposed subclasses. However, the aforementioned named plaintiffs are permitted to pursue their individual claims against the Wholesaler/Retailer Defendants in this action.

F. *Notice*

Class counsel are directed to submit to this Court, as soon as practicable after the entry of this Order, a proposed form of notice of the pendency of this class action; a summary notice for publication purposes; a proposed notice plan for dissemination of class notice; and a proposed notice order. If class counsel intend to argue that any or all of the costs of notice should be borne by Masonite, class counsel shall file and serve, with the proposed notice materials, a brief in support of that position. In the event plaintiffs file such a brief, Masonite shall have ten (10) days in which to file a responsive brief.

CONCLUSION

IT IS ORDERED that plaintiffs' motion for certification of the following plaintiff Class is *GRANTED* and that following the Class is *CERTIFIED* under Rules 23(a)(1)-(4) and (b)(3) of the Alabama Rules of Civil Procedure: All individuals and entities owning property in the United States on which Masonite hardboard siding manufactured since January 1, 1980 has been installed. Excluded from the Class are the defendants, any entity in which any of them has a controlling interest, and their legal representatives, assigns and successors.

IT IS FURTHER ORDERED that Judy Naef, John Brining, Mark Moseley, Gregory Stauffer, Judy Loumakis, Joseph Bashaw and Henry Murphy are designated and appointed as representatives for the Class.

IT IS FURTHER ORDERED that the following law firms are designated and appointed as class counsel for the certified Class: McRight, Jackson, Dorman, Myrick & Moore; Lieff, Cabraser, Heimann & Bernstein; Doffermyre, Shields, Canfield & Knowles; and Cunningham, Bounds, Yance, Crowder & Brown.

IT IS FURTHER ORDERED that plaintiffs' motion for class certification under Rules 23(b)(1)(A) and (b)(2) of the Alabama Rules of Civil Procedure is *DENIED.*

IT IS FURTHER ORDERED that plaintiffs' motion for certification of the Wholesaler/Retailer subclasses is *DENIED;* however, representative plaintiffs Naef, Moseley, Stauffer, Bashaw and Murphy are permitted to pursue their individual claims against the Wholesaler/Retailer Defendants in this action.

IT IS FURTHER ORDERED that as soon as practicable after entry of this Order, class counsel shall file and serve a proposed form of notice; a proposed form of summary notice for publication purposes; a proposed notice plan for dissemination of class notice; and a proposed notice order.

IT IS FURTHER ORDERED that if plaintiffs contend that any or all of the costs of notice should be borne by Masonite, they shall file and serve, along with their proposed notice materials, a brief in support of their ***1092** position. If plaintiffs file such a brief, Masonite shall have ten (10) days in which to respond; and

IT IS FURTHER ORDERED that the motions to strike filed by the parties are *DENIED.*

SO ORDERED, this 15 day of November, 1995.
/s/ Robert G. Kendall

/s/ ROBERT G. KENDALL,

/s/ Circuit Judge
HOUSTON, Justice (concurring in the result in part and dissenting in part).
I concur in the result as to the recusal issue and as to the issue pertaining to disqualifying the plaintiffs' attorneys.

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I would grant permission to appeal and would allow oral argument on the question of the propriety of the certification of a national class to pursue a claim against Masonite on the theory that all Masonite siding manufactured and installed since 1980 is inherently defective, where the class asserts theories of fraud, strict liability, negligence, and breach of warranty and seeks compensatory and punitive damages. *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); *Castano v. American Tobacco Co.,* 84 F.3d 734 (5th Cir.1996). Therefore, I dissent as to this issue.

Ala.,1996.
Ex parte Masonite Corp.
681 So.2d 1068

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