FROM THE

EDITOR

The Federalist Society publishes *Class Action Watch* periodically to apprise both our membership and the public at large of recent trends and cases in class action litigation that merit attention.

Defined as a civil action brought by one or more plaintiffs on behalf of a large group of others who have a common interest, the class action lawsuit is both criticized and acclaimed. Critics say that such actions are far too beneficial to the lawyers that bring them; in that the attorney fees in settlements are often in the millions, while the individuals in the represented group receive substantially less. Proponents of the class action lawsuit see them as a mechanism to consolidate and streamline similar actions that would otherwise clog the court system, and as a way to make certain cases attractive to plaintiffs' attorneys.

Future issues of *Class Action Watch* will feature other articles and cases that we feel are of interest to our members and to society. We hope you find this and future issues thought-provoking and informative. Comments and criticisms about this publication are most welcome. Please e-mail: info@fed-soc.org.

ALI Principles and Litigation Trends

by James Beck

Most people know the American Law Institute (ALI) as an organization founded by the giants of the legal profession, which produced the "Restatements of the Law." There is more to the ALI than just the Restatements, however. More recently, the organization has invested in so-called "Principles" projects, which are more reform-based than the Restatements.

Because the Principles projects involve ideas about what the law "should" be, they have more potential to be controversial, and tend more to reflect the views of the Reporters responsible for them.[1] The current ALI "Principles of the Law of Aggregate Litigation" ("PLAL"), now in its second "Discussion Draft," bears watching for precisely these reasons. If adopted in something close to its current form, the PLAL would put the ALI's prestige squarely behind an unprecedented expansion of aggregated "big litigation"—class actions, mostly, but other forms of aggregation as well.[2]

The current PLAL are very favorably inclined towards the aggregation and resolution of litigation in large units. In many ways, (I have counted at least thirty), the PLAL proposes to change or add to existing law so as to encourage and expand the availability of class actions and other forms of aggregate litigation. Many of these alterations would require amendment of procedural rules or overturning of existing precedent to go into effect.

I. The Impact of Big Litigation?

Almost all litigation has either the intent or the effect of forcing the targeted defendant to change something it is doing. This can be direct, as with an effort to enjoin the defendant to act differently, or indirect, *e.g.* making the challenged conduct uneconomical through imposition of money damages. Whenever litigation is aggregated, the stakes for the defendant are raised in direct proportion to the extent of the aggregation. Most defendants, especially corporate ones, are risk-averse—they do not like to bet the company on one roll of the litigation dice.[3] Thus, claims that on an individualized basis are easily defensible, even so weak that they would never be clogging up the legal system in the first place, become incalculably more dangerous when thousands or millions of them are joined together in a monolithic whole.

An appropriate cautionary tale, which occurred long enough ago that most of its ramifications have become apparent through time: the *Agent Orange* litigation over alleged injuries from defoliants used by the government during the Vietnam War. As individual cases, *Agent Orange* lawsuits were meritless. The government itself, as a sovereign exercising its powers to wage war, was immune from suit. Against the manufacturers of the defoliant who found themselves in the litigation cross-hairs, it was simply impossible for a plaintiff to prove causation, either as to product identification (specifying which defendant's product actually caused a plaintiff's injury) or medically, since exposure to dioxin at the concentrations at issue (another problem of proof) were not scientifically proven to cause the conditions alleged.[4] Individually, such cases certainly could not have survived summary judgment, and most would have been dismissed immediately for failure to specify the responsible defendant. A federal district court, however, decided to aggregate some 600,000 individual

"claims" as a class action. In an instant, the defendants' potential exposure increased by six orders of magnitude. That increased risk had value, and the defendants settled for over $200 million dollars, a huge amount in the mid-1980s.[5]

The aggregation itself, however, was on shaky ground. The only way to certify a class was to ignore accepted choice of law principles by using non-existent "national consensus" law. Being before Rule 23 was amended to permit interlocutory appeals of class certification orders,[6] the ruling was only belatedly disapproved on appeal.[7] The damage, however, had been done, and the defendants could not go back and reclaim what the aggregation had forced them to give away in settlement. As it was, the only way the *Agent Orange* defendants were willing to settle was to purchase "peace" by including the potential claims of many thousands of persons who may have been exposed, but who had not yet been injured. Thus, the so-called "futures problem" emerged in aggregate litigation. Where a person has yet to suffer any injury, it is questionable whether there is even a justiciable claim—particularly in federal court.[8] It is certainly almost impossible to give effective notice to uninjured people who have no reason to pay attention to litigation they have no reason to believe involves them.

Given the passage of time, inevitably some of the *Agent Orange* "future" claims matured—at least arguably. Actually injured now, these persons objected to being bound by a settlement in which they had no part. They were successful, and more than a decade after the fact the *Agent Orange* settlement was overturned for its pervasive lack of procedural due process as to future claimants.[9] The defendants, the ones who had paid over $200 million dollars for peace, got neither peace nor their money back.[10]

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More Searching Fact-Based Scrutiny of Proposed Class Actions Reaches Securities and Antitrust Actions

by Brian D. Boyle & Julia A. Berman

Blackmail settlements,"[1] "*in terrorem* power"[2] in the hands of class counsel—these are the consequences of improvident class certification decisions, according to courts that have despaired at lax enforcement of Rule 23 prerequisites. These labels stem from the knowledge that the decision to certify immediately ups the ante in class litigation, placing "hydraulic" pressure on defendants to resolve even unmeritorious claims before trial.[3] Indeed, a Federal Judicial Center study found that settlements resulted in nearly 90% of cases in which the courts had certified a class.[4]

Over the last twenty years, courts in product liability and mass tort actions have begun to check inappropriate use of the class device by scrutinizing the evidence relevant to the purported class claims to determine whether it is of "classwide" dimension—that is, whether it tends to advance or rebut the claims of all putative class members simultaneously.[5] Until recently, however, evidence-focused review of proposed classes in the antitrust and securities realms has been the exception, rather than the rule. That has changed over the past couple of years. Recent decisions in the Second, Fifth and Eighth Circuits exemplify the new approach, exploring the quantum of proof that plaintiffs seeking certification should be required to muster on factual elements crucial to class treatment. Thus, these decisions can offer important insights for class actions generally.

I. Common Groundwork

The legal standard for class certification is the same across legal disciplines; regardless of the content of a plaintiff's complaint, every purported class must meet the requirements of Rule 23. As a practical matter, however, the courts' application of Rule 23 has varied widely with the subject-matter of the complaint, with securities and antitrust classes being given considerably less scrutiny than others.[6]

In *Eisen v. Carlisle & Jacquelin*[7], the Court held that "nothing in the language or history of Rule 23…gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." However, in two subsequent decisions, *Coopers & Lybrand v. Livesay*[8] and *Gen. Tel. Co. of the Sw. v. Falcon*,[9] the Court indicated that "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." The Court in *Falcon* further instructed trial courts to conduct a "rigorous" analysis to ensure that the putative class satisfied Rule 23's requirements.[10] While a close look at these cases reveals that they need not conflict with each other at all, it is easy to see how these apparently conflicting directives could have resulted in inconsistent applications by the lower courts.

In *Eisen*, the Court faced an unusual situation—the merits inquiry there arose not in the context of evaluating whether plaintiffs' claims turned on common proof, but in relation to Rule 23's notice requirements.[11] Providing the required notice was prohibitively expensive for the plaintiff.[12] Wanting to avoid effectively ending a potentially meritorious lawsuit, but reasoning that it would be unfair to impose notice costs on defendants if the suit lacked merit, the district court examined whether the plaintiff could demonstrate "a strong likelihood of success on the merits"—if the plaintiff could make such a showing, the court would shift the costs of notice to the defendants.[13] Ultimately, the plaintiff succeeded in making this showing, and the court shifted ninety percent of the notice costs.[14] On appeal, the Second Circuit held that the district court had no authority to conduct this merits inquiry, and the Supreme Court agreed.[15] In that context—examining whether the district court had the authority to conduct a preliminary-injunction-like analysis of whether the plaintiff could prevail—the Supreme Court pronounced in oft-cited language that "nothing in either the language or history of Rule 23" permits "a preliminary inquiry into the merits of a suit."[16] While this holding did not address a merits inquiry that overlapped with Rule 23's various requirements, many courts (discussed below) thereafter interpreted it to extend to such situations.

In contrast, *Livesay* and *Falcon* dealt directly with the role of the merits in analyzing whether a putative class meets Rule 23's prerequisites to certification. In *Livesay*, the Court considered the nature of the decision to certify or decertify a class in order to determine whether it was the kind of holding which was immediately appealable.[17] In its analysis, the Court discussed the extent to which class decisions necessitate examining the factual and legal issues involved in an action. Quoting from *Federal Practice and Procedure*, the Court listed "obvious examples" of determinations under Rule 23 which were "intimately involved with the merits of the claim"—these included typicality, adequacy, and the presence of common questions of law and fact.[18] The Court further indicated that "[t]he more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits."[19]

Subsequently, in *Falcon*, the Court again emphasized that "actual, not presumed, conformance with Rule 23(a) remains… indispensable."[20] There, the Court found that the district court had certified an overbroad class in a

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Fluid Recovery: Manufacturing "Common" Proof in Class Actions?

by Jessica D. Miller & Nina Ramos

As the Class Action Fairness Act (CAFA) moves toward its third anniversary, plaintiffs' attorneys continue their efforts to preserve aggregate litigation in a post-CAFA age. Without doubt, CAFA has put the squeeze on traditional plaintiff class action strategies. No longer can plaintiffs simply file a class action in a favored state court jurisdiction and be assured of certification. Nor can they use the leverage of unfavorable state courts to extract settlements of meritless claims. Instead, plaintiffs must now pursue most class action litigation in federal courts, which have, as a general matter, been far more skeptical of such cases than their state court counterparts, and have taken seriously Fed. R. Civ. P. 23's requirement that class actions can only be certified if each class member can prove his/her claims using the same evidence. Because this standard is difficult, if not impossible, to satisfy in the vast majority of product liability cases, product liability class actions are generally disfavored in federal court.

The result is that plaintiffs' attorneys have begun to look for new and creative ways to convince federal judges that product liability cases can be tried on a classwide basis. These innovative strategies have included: strategic alliances with state attorneys general, who can bring aggregate litigation without having to worry about the requirements of Rule 23 or CAFA's jurisdictional provisions; proposed "issues trials" that ostensibly segregate common issues for trials that are divorced from any one plaintiff's actual experiences; and consolidated, multi-plaintiff trials—widely recognized as prejudicial to defendants—in receptive state courts (since CAFA only expanded jurisdiction over such cases if more than 100 plaintiffs are involved). This article addresses yet another tactic that has been employed by plaintiffs' attorneys in an effort to overcome the due process-based requirements of Rule 23: fluid recovery.

Fluid recovery seeks to demonstrate causation on a classwide basis through the use of statistics. The Second Circuit is currently reviewing the question whether "fluid recovery" is a legitimate means of proving causation on a classwide basis or an impermissible statistical end-run around Rule 23's predominance requirement. In *Schwab*

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II. How ALI's Principles of Aggregate Litigation Would Foster and Encourage More and Larger Lawsuits

The PLAL is not reticent about the nature of what is being proposed. The Reporters confirm that the PLAL in many ways "consciously break[] from much of the terminology and organization of existing law with regard to aggregation through class actions."[11] What this means is that those parts of the current class action rules—such as "predominance," "superiority," and equivalent state law requirements— that have tended to restrict the availability of the class action device (particularly in cases involving money damages)[12] are subject to revision as "overly formalistic."[13]

As stated in the PLAL, the listed "objects" of aggregate proceedings are, in cases involving money damages:[14]

- maximizing the net value of the group of claims;
- compensating each claimant appropriately; and
- enabling claimants to voice their concerns and obtain legal vindication.[15]

For "indivisible" (injunctive) claims, the listed "objects" are:

- obtaining a judicial resolution of the legality of the challenged conduct;
- stopping challenged conduct from continuing; and
- enabling persons aligned with the aggregations to voice their concerns and facilitating... further relief that protects the rights of affected persons.[16]

The PLAL thus makes it quite obvious that the "objects" it pursues for aggregate litigation are those sought by the plaintiffs in such litigation, such as "maximizing the net value" of the claims and "stopping challenged conduct" by defendants.

The rest of the PLAL seeks to expand use of aggregated proceedings in a pro-plaintiff manner. In place of the familiar analytical framework of the present class action rules, the PLAL is organized in favor of "finality, fidelity, and feasibility"—terms borrowed from a 2006 law review article.[17] These terms do not track any procedural rule enacted by any jurisdiction, however. And while the law review article focused solely on a subcategory of aggregated litigation, (monetary damages), the PLAL would expand them to encompass any type of aggregated litigation. This attempt to impose the same model on all aggregated litigation distorts the intended purpose of "finality, fidelity, and feasibility," which was to place further limits upon class certification:

> Class actions seeking damages under Rule 23(b)(3) would thus be permissible only if they were a superior method of feasibly adjudicating both the similar and dissimilar aspects of class members' claims to judgment under the substantive law governing claims and defenses.[18]

These three principles were to "set minimum parameters for rules guiding judicial discretion in assessing the similarity and dissimilarity of individual claims in a putative class action."[19] The numerous illustrations of "red flags," which the law review article provides, precluding aggregation under the original use of "finality, fidelity, and feasibility",do not find their way into the PLAL.[20] Instead, the PLAL pulls these three principles out of their limited context and uses them to create a test for aggregation based upon "material advancement" of the litigation process.[21] "Material advancement," however, is not a test of class certification; it is a test of predominance. As stated in the case upon which the PLAL relies:

> The defendants' main contention is that... the common issues of fact and law these claims involve do not *predominate* over the individualized issues involved that are specific to each plaintiff.... Whether 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*.... Put simply, if the addition of more plaintiffs to a class requires the presentation of significant amounts of new evidence, that strongly suggests that individual issues are important. If, on the other hand, the addition of more plaintiffs leaves the quantum of evidence introduced by the plaintiffs as a whole relatively undisturbed, then common issues are likely to predominate.[22]

"Material advancement," in the context of evaluating the nature of the proofs required in aggregated litigation as part of the predominance test makes sense. Claims that are factually diverse such that their joint litigation does not "materially advance" their adjudication are plainly not going to present predominately similar issues.

Expanding "material advancement" into the primary test for aggregation itself, however, creates a tautology in favor of aggregating everything, since the PLAL defines "material advancement" in terms of both the "resolution of common issues in the aggregate" and in terms of "marketability"—that is, whether lawyers would be willing to take on a representation.[23] By virtue of these definitions, aggregation would become the norm

rather than the exception. First, they put rabbit in hat, since any issue decided commonly obviously need not be revisited. Second, economics dictates that the larger the amount in the dispute, the more likely a lawyer will take the case. Aggregation, by definition, makes litigation more "marketable."

Section 2.03 also seeks to abolish the predominance requirement for class certification *sub silentio* by greatly expanding the scope of "single issue" class certification.[24] Single issue certification has traditionally been unusual—an exception rather than a rule—because courts have viewed it as a "procedural tool to sever common issues for trial and not as a vehicle to reach certification."[25] The PLAL itself acknowledges that issue certification currently operates only in a "more limited" fashion, "within the larger constellation" of the entire matter at suit.[26] To allow certification of a single issue by itself, without any comparison to the individualized issues posed by all of the rest of the litigation, "would eviscerate the predominance requirement... the result would be automatic certification in every case where there is a common issue."[27]

That result is precisely what the PLAL seeks to achieve. "Aggregate treatment is thus possible when a trial would allow for the presentation of evidence sufficient to demonstrate the validity of all claims with respect to a common issue."[28] Thus, "a defendant's negligence" in an environmental pollution case would become a separately triable common issue.[29] Likewise, the PLAL applies the same "material advancement" test to the issue-specific dividing line between "liability" and "remedy."[30] Of twelve relevant illustrations, eight allow issue aggregation.[31] The result is, again, that issue certification would become the norm.

In justifying its expansive view of single-issue certification, the PLAL uses the metaphor of "carv[ing] at the joint," from the *Rhone-Poulenc Rorer* case.[32] That opinion did not apply the metaphor, however, either to support or to reject issue certification. Rather, the court used it in declaring unconstitutional the aggregate bifurcation of trial in such a way that would have different juries examining the same issue of the defendant's fault in violation of the Seventh Amendment.[33] The PLAL proposes overruling *Rhone Poulenc* (and numerous other cases) on precisely this point, and effectively reducing Seventh Amendment protections for defendants in the context of aggregated litigation to a "historical artifact."[34]

PLAL's treatment of the medical monitoring cause of action deserves special attention. Medical monitoring is a controversial cause of action, and quite a few courts have refused to recognize it altogether.[35] Even in those jurisdictions that have adopted it, many courts under a variety of circumstances have declined to certify medical monitoring class actions because of the numerous individualized elements present in this sort of claim.[36] Nonetheless, the PLAL treats medical monitoring claims, under certain circumstances, as models of an "indivisible" claim that is not only suitable for aggregated treatment but subject to *mandatory, non-opt-out* class certification.[37]

The PLAL also raises questions about the limits of judicial power, authorizing "cy pres" or "fluid recovery" settlements.[38] If the claimed damages are so minimal that it is uneconomical to identify how much money is owed deserving class members, it should be a red flag that litigation is an inefficient way to handle the situation, and that administrative enforcement is a preferred avenue. The PLAL would allow courts to give such funds away to charities that they (or class plaintiffs' counsel) select.[39]

In addition to these major, conceptual reworkings of the law, the PLAL, as currently drafted, advocates changing the law in many other ways that would eliminate existing barriers to the creation, management, and settlement of claims on an aggregated basis:

A. In the interest of broadening the scope of aggregate litigation, the PLAL would prohibit defendants from defeating aggregation by conceding the common issues.[40] The effect of this provision would be to force parties to engage in litigation and discovery concerning issues that are actually not in serious dispute.

B. The PLAL exhorts courts to experiment with "creative" procedural arrangements in pursuit of aggregating litigation.[41] Such creativity, however, has a history of threatening defendants' procedural and substantive rights.[42] Moreover, the history of aggregate litigation demonstrates that procedural "advances" generate their own traffic. Loosening procedural constraints to facilitate more litigation only produces more litigation.

C. The PLAL seems to consider all single-point environmental pollution cases to be appropriate class certification, at least as to individual "common" issues.[43] While the PLAL purports to define commonality as "the determination of a common issue as to one claimant should resolve the same issue as to all other claimants,"[44] single source pollution cases are notorious exceptions, since to prove one claimant's injuries that claimant need only prove his or her own exposure to the pollutant—not that of every other member of the purported class.

D. Under PLAL, at least some aspects of virtually every product liability case would be capable of being litigated,

since claims for breach of warranty are commonplace in such litigation, and the "merchantability" of a product is used as an example of a "common" issue that can be appropriately litigated in aggregated fashion.[45] This result would be a reversal of current law, since another comment to PLAL concedes, "the class action has fallen into disfavor as a means of resolving mass-tort claims."[46]

E. The PLAL would require parties opposing class certification to bear the burden of proof on conflict of law[47]—a reversal of current precedent, under which the proponent of class certification bears the burden of proving all elements that support the aggregation of litigation.[48]

F. The PLAL also gives textual treatment to the widely rejected[49] choice of law argument (almost never seen outside of class action litigation) that the governing law should be the law of a defendant's principal place of business.[50]

G. The PLAL advocates overturning current Supreme Court precedent in order to allow the conduct of aggregated trials in the context of multi-district litigation, thus enabling more pressure on defendants to settle.[51]

H. Contrary to almost all recent precedent, which holds that punitive damages can be decided only for persons before the court, and only in connection with their particular compensatory damages,[52] the PLAL continues to take the position that punitive damage claims may be decided on an aggregate, class-wide basis.[53] Recent (post-State Farm) cases rejecting this approach include: *In re* Chevron Fire Cases, 2005 WL 1077516, at *14-15 (Cal. App. May 6, 2005) (unpublished).

I. The PLAL takes widely divergent views of due process rights, depending upon whether those rights belong to defendants—in which case they are but an "admonition" or "reminder" in a comment[54]—or whether those rights belong to plaintiffs in which case they are mandatory black-letter law.[55]

J. The PLAL facilitates the conduct of aggregate litigation by authorizing courts in non-binding consolidations (mostly MDL situations) to order non-consenting plaintiffs to pay "common costs" to other plaintiff lawyers whom they have not retained.[56] This practice has never received appellate approval.[57]

K. The PLAL would resuscitate a failed proposal to amend the Federal Rules to create a new type of class action—presumably more palatable where certification is of doubtful propriety—requiring class members affirmatively to "opt-in."[58]

L. The PLAL rejects existing precedent[59] and would allow class action plaintiffs to refile identical class actions in other jurisdictions after initially failing in federal court and losing on appeal.[60] The collateral estoppel analysis is inconsistent with the PLAL's recognition in another context that the "contingent fee lawyer is a real party in interest" in aggregate litigation.[61]

M. Perpetuating a peculiar legal doctrine that encourages filing of meritless class actions, the draft advocates allowing unsuccessful class actions to toll the running of the statute of limitations for all class members.[62]

N. The PLAL would abolish the current constitutional due process right to individualized notice of class action proceedings as too expensive.[63]

O. To facilitate settlements of aggregate litigation (thus increasing the incentive to bring such claims in the first place) the PLAL would overturn current Supreme Court precedent and allow settlement of class actions even though individual issues predominate.[64]

P. Even though defendants are not responsible for the improper actions of opposing class counsel and owe no litigation-related duties to litigation opponents, the PLAL would impose *upon defendants* part of legal fees incurred by successful objectors to class settlements.[65]

Q. PLAL admits the constitutional problems of providing notice to uninjured "future" claimants, but takes an approach, "inconsistent" with current Supreme Court precedent,[66] that guardians *ad litem* are sufficient enough to allow aggregated disposition of such future claims.[67]

III. Expansion of Aggregated Litigation and Current Legal Trends

In advocating dozens of legal changes, all of which are intended to increase the frequency of class actions and other forms of aggregated litigation, the ALI is swimming against the current for reduction, rather than expansion, of aggregated litigation. In the federal court system, since *Ortiz v. Fibreboard Corp*.,[68] and *Amchem Products, Inc. v. Windsor*,[69] the courthouse door has definitively slammed shut against class actions in personal injury and product liability actions. *Ortiz* and *AmChem* have been on the books now for a decade, and during that decade not a single contested personal injury/product liability class action has survived appeal.[70]

Congress has concurred in this federal trend away from class actions. In 2005 it passed the Class Action Fairness Act, designed to force a wide range of putative class actions into the federal system, with the expectation that these class actions would be governed by the increasingly restrictive federal precedents.[71]

States are also joining this trend. State class actions have been pruned significantly in Texas, where the state supreme court explicitly adopted as "essential" "a cautious approach to class certification," rejecting its former "approach of certify now and worry later."[72] In Illinois, the state supreme court has held that "the class action device is unsuitable for mass tort personal injury cases,"[73] and has taken steps to strengthen the predominance element generally.[74] The notorious Mississippi rule that used to allow hundreds of plaintiffs to join together in mass aggregations in lieu of class actions (which Mississippi does not recognize) has been abolished.[75]

CONCLUSION

Those who are interested in measuring the costs and benefits of aggregated litigation would do well to pay close attention to the progress of the PLAL through the ALI's process of consideration and approval. As it currently stands, the PLAL would put the ALI on record as supporting a fundamental reordering of how litigation is conducted in this country.

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Endnotes

1 "Reporters" are the persons (almost always law professors) charged with actually drafting the language of an ALI project.

2 The current draft of the PLAL, like all ALI publications, is available for purchase from the Institute. *See* http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=80.

3 *See In re Rhone-Poulenc*, 51 F.3d 1293, 1298-99 (7th Cir.) (discussing roll of increased risk in bringing about "blackmail settlements" in class action litigation), *cert. denied*, 516 U.S. 867 (1995)

4 *See In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1267 (E.D.N.Y. 1985) and *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y.1984) (both discussing at length the impossibility of proving causation).

5 *See In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1396 (E.D.N.Y. 1985) (discussing settlement).

6 *See* Fed. R. Civ. P. 23(f).

7 In *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 182-83 (2d Cir. 1987), the validity of the class certification order was considered in the context of determining the "fairness" of the settlement in light of the chances that the aggregation itself would be struck down.

8 *E.g.,* Redish & Kastenek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. Chi. L. Rev. 545 (2006) (addressing justiciability of "future" claims in the context of class actions).

9 Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001), *aff'd by equally divided court*, 539 U.S. 111 (2003).

10 For claims that as individual actions would certainly had been subject to quick dismissal for lack of causation a Westlaw search limited to judicial opinions shows 107 separate "*Agent Orange*" entries in the district court (between 1979 and 2005), twenty-two in the Second Circuit, and a "History" that's over three Westlaw screens long.

11 PLAL §1.03, reporters notes to comment b.

12 *See* Fed. R. Civ. P. 23(b)(3), and equivalent state rules.

13 PLAL §1.02, reporters' notes to comment u.

14 PLAL §1.05.

15 *Id.* It should be noted that the "objects" as stated are in terms of "include but are not limited to."

16 *Id*.

17 *See* Erbsen, *From Predominance to Resolvability: A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995 (2006), discussed at PLAL §1.03, comment b and accompanying reporters' notes.

18 *Id*. at 1081.

19 *Id*. at 1024.

20 *Id*. at 1028-30.

21 PLAL §2.03, comment a (citing Klay v. Humana, Inc., 382 F.3d 1241, 1254-55 (11th Cir. 2004)).

22 Klay v. Humana, Inc., 382 F.3d 1241, 1254-55 (11th Cir. 2004) (citations, quotation marks, and parentheticals omitted) (emphasis added).

23 PLAL §2.03, comment a.

24 Fed. R. Civ. P. 23(c)(4) provides that "[w]hen appropriate [] an action may be brought or maintained as a class action with respect to particular issues."

25 *E.g.,* Castano v. American Tobacco Co., 84 F.3d 734, 745 n. 21 (5th Cir. 1996); *In re N. Distr. of Calif. Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847, 856 (9th Cir. 1982); Blain v. Smithkline Beecham Corp., 240 F.R.D. 179, 190 (E.D. Pa. 2007); Arch v. American Tobacco Co., 175 F.R.D. 469, 496 (E.D. Pa. 1997).

26 PLAL §2.04, comment b.

27 *Castano*, 84 F.3d at 745 n.21 (citing Fed. R. Civ. P. 23(b)(3)).

28 PLAL §2.03, comment c.

29 PLAL §2.03, comment d.

30 PLAL §2.04.

31 *Id.*

32 PLAL §2.03, comment c & accompanying reporters' notes (quoting *Rhone-Poulenc Rorer*, 51 F.3d at 1302.

33 *Rhone-Poulenc Rorer*, 51 F.3d at 1302-03.

34 PLAL §2.04 reporters' notes to comment b; §2.11, comment c; §2.11, reporters' notes to comment a.

35 Citing highest courts in the jurisdiction only: Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 242, 442 (1997); Hinton v. Monsanto Corp., 813 So.2d 827, 830-32 (Ala. 2001); Mergenthaler v. Asbestos Corp., 480 A.2d 647, 651 (Del. 1984); Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849, 852-56 (Ky. 2002); Henry v. Dow Chem. Co., 473 Mich. 63, 701 N.W.2d 684, 686 (2005); Paz v. Brush Engineered Materials Inc., 949 So.2d 1, 3-6, 9 (Miss. 2007); Badillo v. Am. Brands, Inc., 16 P.3d 435, 440-41 (Nev. 2001).

36 *E.g.,* Barnes v. Am. Tobacco Co., 161 F.3d 127, 142-43 (3d Cir. 1998); *In re Baycol Products Litigation*, 218 F.R.D. 197, 212 (D. Minn. 2003), Lockheed Martin Corp. v. Super. Ct., 63 P.3d 913, 926-27 (Cal. 2003); Buynie v. Airco, Inc., 2007 WL 2275013, at *8-9 (N.J. Super. A.D. Aug 10, 2007).

37 PLAL §2.05 & illustrations 1-5.

38 PLAL §3.07.

39 PLAL §3.06, illustration 2.

40 PLAL §2.03, comment d.

41 PLAL §2.03, comment e

42 *E.g., In re* Simon II Litig., 407 F.3d 125, 138-39 (2d Cir. 2005); Cimino v. Raymark Indus., Inc., 151 F.3d 297, 320 (5th Cir. 1998); *Rhone-Poulenc Rorer*, 51 F.3d at 1297; *Castano*, 84 F.3d at 750-51; *In re* Fibreboard Corp., 893 F.2d 706, 711-12 (5th Cir. 1990);

43 PLAL §2.04, illustration 4.

44 PLAL §2.03, comment a.

45 PLAL §2.04, illustrations 9 and 12.

46 PLAL §1.02, comment w.

47 PLAL §2.06, comments a & f.

48 *E.g.,* Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 321 (4th Cir. 2006) ("we have stressed in case after case that it is not the defendant who bears the burden of showing that the proposed class does not comply with Rule 23, but that it is the plaintiff who bears the burden of showing that the class does comply"); Steering Comm. v. Exxon Mobil Corp., 461 F.3d 598, 601 (5th Cir. 2006); Trevizo v. Adams, 455 F.3d 1155, 1162 (10th Cir. 2006); Chiang v. Veneman, 385 F.3d 256, 264 (3d Cir. 2004); Valley Drug Co. v. Geneva Pharm., Inc., 350 F.3d 1181, 1187 (11th Cir. 2003); *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996).

49 For recent cases refusing to apply the law of the defendant's place of business, *see* Rowe v. Hoffman-La Roche Inc., 917 A.2d 767, 775-76 (N.J. 2007); Kelley v. Eli Lilly & Co., 2007 WL 1238789, at *2-3 (D.D.C. April 27, 2007); Bearden v. Wyeth, 482 F. Supp.2d 614, 620-22 (E.D. Pa. 2006).

50 PLAL §2.06, comment c.

51 PLAL §2.08, comment j & accompanying reporters' notes (discussing Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998)).

52 Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063 (2007); State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422-23 (2003); *Simon II*, 407 F.3d at 139; Engle v. Liggett Group, Inc., 945 So.2d 1246, 1263 (Fla. 2006); Johnson v. Ford Motor Co., 113 P.3d 82, 94-95 (Cal. 2005); *Buynie*, 2007 WL 2275013, at *8-9; Colindres v. QuitFlex Mfg., 235 F.R.D. 347, 378 (S.D. Tex. 2006); O'Neal, v. Wackenhut Servs., Inc., 2006 WL 1469348, at *22 (E.D. Tenn. May 25, 2006).

53 PLAL §2.08, and reporters' notes to comment i.

54 PLAL §2.08, comment k.

55 PLAL §3.03.

56 PLAL §2.09(b).

57 *See In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.-II*, 953 F.2d 162, 166 (4th Cir. 1992) (rejecting such assessments as an abuse of power).

58 PLAL §2.10, comment a.

59 *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763 (7th Cir. 2003).

60 PLAL §2.12, and comment a.

61 PLAL §1.04, reporters' notes to comment b.

62 PLAL §3.02 reporters' notes to comment c.

63 PLAL §3.04.

64 PLAL §3.06 (criticizing Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997)).

65 PLAL §309(c).

66 PLAL §3.10, reporters' notes to comment d (advocating that the "more formalistic" aspects of *Amchem*, 521 U.S. 591, and *Ortiz v. Fibreboard Corp.,* 527 U.S. 815 (1999), be done away with).

67 PLAL §3.10(b).

68 527 U.S. 815 (1999).

69 521 U.S. 591 (1997).

70 In addition, the old rule, supposedly garnered from *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), that restricted inquiry into the substantive merits of claims during the class certification phase, is on its last legs. *See* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 160-61, (1982) (a court must conduct a "rigorous analysis" during which it "may be necessary for the court to probe behind the pleadings"); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006) (applying *Falcon* specifically to approve extensive merits consideration at certification statge).

71 Pub. L. 109-2, 119 Stat. 4.

72 Southwestern Refining Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000).

73 Smith v. Ill. Cent. R.R. Co., 860 N.E.2d 332, 340 (2006).

74 Avery v. State Farm Mutual Auto. Ins. Co., 835 N.E.2d 801, 820-21 (Ill. 2005).

75 Albert v. Allied Glove Corp., 944 So.2d 1, 4-5 (Miss. 2006); Janssen Pharm. v. Armond, 866 So.2d 1092, 1099 (Miss.2004).