

Finality in Litigation

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In Charles Dickens' classic "Bleak House", Dickens excoriates a society in which lawyers have run rampant. Describing a case spanning several lifetimes, *Jarndyce v. Jarndyce*, he explained the problem:

And thus, through years and years, and lives and lives, everything (in the lawsuit) goes on, constantly beginning over and over again, and nothing ever ends. And we can't get out of the suit on any terms, for we are made parties to it, and must be parties to it, whether we like it or not.

Does this sound all-too-familiar? Frustrating? Painful?

Commonly, litigation over a single disputed occurrence or issue having widespread effects will result in a number of lawsuits spanning an indefinite period of time. For example, the manufacturer of a defective product distributed throughout the country may be sued individually by every person or group, in multiple venues, claiming personal injury or property damage. Likewise, the owner/operator of an industrial facility or waste site may be sued multiple times by parties in the vicinity of the facility, claiming damages and injuries from pollution.

The high cost of litigation makes it important for all litigants to resolve disputes quickly and effectively. An individual plaintiff wants their "day in court", unaffected by claims asserted by other parties. Contrast this with the fundamental desire of a corporate defendant to resolve all potential claims relating to an allegedly defective product, explosion, chemical spill or securities fraud. Time after time, we hear demands for "finality" from general counsels' offices. The

financial well-being of all companies, regardless of size, requires that litigation lead to an effective (i.e., final) resolution of the dispute.

This article explores a number of vehicles that are used in an attempt to secure “finality” in multiple-potential-plaintiff scenarios. While every option needs to be explored in an effort to limit the duplicative nature of litigation and to ensure that settlements and judgments can truly be considered the final resolution of a case, experience teaches us that finality is not always achievable.

A more realistic goal is to ensure that inevitable litigation is handled aggressively, comprehensively and cost effectively, with due consideration given to the options discussed below.

An Illustrated Definition of the Problem

A vast number of businesses have encountered the challenges of litigating a mass tort. First, consider the dilemma faced by Shell Oil Co. and the Hoechst Celanese Corp. in conducting their Polybutylene Plumbing Litigation. The subject of this dispute was the installation of faulty polybutylene plumbing pipe in mobile and site-built homes. These pipes were proven to be defective and thereby responsible for property damage and widespread premature plumbing pipe replacement and repair. The defect took the Defendant companies over 10 years to resolve. The Defendants found themselves throughout this decade defending themselves in suits by individual, and large groups of, Plaintiffs, nationwide; a nationwide class action in Greene County, Alabama; a statewide class action on behalf of mobile homeowners in Monterrey County, California; and threatened class actions in many other state courts.¹ Although all individual cases against Shell and Celanese involved differences in causation and damages, the underlying issue in all of these cases was: Are the Pipes Defective?

Numerous examples of duplicative litigation over the same issues in mass torts are commonplace. Consider the protracted products liability litigation endured by Dow Corning regarding their production of breast implant products. The breast implant issue ultimately led to the company's voluntary initiation of Chapter 11 reorganization proceedings. It was not the \$4.255 billion settlement that caused Dow-Corning's bankruptcy problems but, rather, the costs associated with continued exposure to individual claims outside of the non-mandatory settlement class.²

Similarly, General Motors has been forced to defend itself in numerous judicial proceedings regarding one product. Lawsuits alleging a safety defect in the fuel tank placement in 1973-1987 GM vehicles was the basis of litigation in a federal court in Pennsylvania and the state courts of Texas, Louisiana, and Georgia.³ Another example of the extreme costs of repetitive litigation and settlement is presently being encountered by the tobacco industry. Although the claims of negligence, fraud, and failure to warn against tobacco companies are common to all American smokers, the tobacco industry has been forced to defend itself on these same issues in numerous judicial proceedings throughout the country.

In the environmental context, litigation can be equally onerous and widespread. The manufacturers of asbestos-containing products have been sued repeatedly in recent years and fully understand the inefficiencies of the current legal system and mass torts. It is estimated that between 13 and 21 million workers have been exposed to asbestos in the workplace over the last 50 years, spawning several hundred thousand lawsuits.⁴ In one recent year, asbestos-related filings constituted over six percent of all federal civil filings.⁵ The disposition of individual cases has also been very slow, in part due to the parties litigating in every case "every contestable issue involving the same products, the same warnings, and the same conduct."⁶ The

Johns-Manville Corporation, in particular, has been the most adversely affected Defendant in asbestos cases and ultimately filed for Chapter 11 reorganization when faced with 17,000 pending tort claims and another 35,000 claims expected.⁷ Recently, the United States Supreme Court ruled 7-2 that lower courts had incorrectly approved a \$1.54 billion asbestos-related class action settlement.⁸

Litigation strategies and their prospects for litigation finality

Several options exist for resolving pending or potential lawsuits. The strategies currently available for Defendants in mass tort litigation include: the piecemeal strategy of responding to claims as they are filed; the joinder of all current and potential Plaintiffs in the first pending action of what appears to be a series, or potential series, of lawsuits; certification of a Plaintiff class; and the use of a Declaratory Judgement action brought by a Defendant against either a group or class of Plaintiffs.

1. Piecemeal litigation and settlement

The strategy most often employed by corporate Defendants to resolve pending or potential lawsuits is the use of “piecemeal” litigation. A strategy of piecemeal litigation is a reactive response to lawsuits as they are filed, wherever they are filed. Piecemeal litigation is based on the theory that the Defendant will only have to deal with the absolute minimum number of Plaintiffs. This is presumably because the only Plaintiffs who will file a lawsuit will be those who are injured, aware of their injury, ready to initiate a lawsuit, and either fund the litigation themselves, or find an attorney to do so.

In theory, repeated defense of the same claim should become easier to duplicate after several trials or preparation for trial. Three major factors make subsequent proceedings an easier process: the initial investment in legal and technical research and documentation can be recycled

throughout the series of lawsuits; the theory of collateral estoppel may preclude some issues from being repeatedly relitigated; and various statutes of limitation may begin to run and preclude future lawsuits after the first claim is litigated.

Repeated litigation should become more efficient with each passing lawsuit. Obviously, the initial litigation of an issue will be the most time consuming and expensive because much of the required research will be novel. It will take substantial resources to prepare initial legal research and legal opinions, expert reports, and models and other presentations of compiled raw data. For subsequent litigation, many of the issues will be very similar to the original lawsuit and, thus, research, reports and models compiled in the first lawsuit will probably be useful in subsequent lawsuits.

Secondly, the legal theory of collateral estoppel may prevent the relitigation of repeatedly contested mass tort issues. Historically, the courts have prevented relitigation of an issue in other courts only if the parties to both actions are identical or closely related. However, the current judicial trend is to expand the preclusive effect given to an original judgment to other parties not involved in an original lawsuit but later attempting to relitigate the issue on their own behalf.

Evaluation of the effect of collateral estoppel becomes more complex considering that every state and the federal system have different policies regarding collateral estoppel subject to wide judicial discretion.⁹ For example, the federal courts and the majority of state courts allow collateral estoppel but only in favor of a Defendant defending against multiple suits by different Plaintiffs.¹⁰ Louisiana has maintained a policy of denying collateral estoppel in all cases unless both of the parties in the subsequent suit were parties to the initial suit.¹¹ Many states appear to be somewhere in between the federal and Louisiana applications of collateral estoppel. Texas,

for example, does not require both parties to have been involved in the first suit but does require a party to have participated in or exerted control over a previous litigation or to have held a beneficial interest in the judgment before that party will have their claim precluded.¹²

Finally, statutes of limitations may make subsequent lawsuits by mass tort Plaintiffs more difficult as time passes. Statutes of limitation prevent lawsuits that are brought too late after a cause of action accrues. Defining when a cause of action accrues is sometimes quite difficult. As in the collateral estoppel context, different courts define statutes of limitation and date of accrual differently. Historically, the time period to measure a statute of limitation began when all of the actions giving rise to a claim have occurred, thereby beginning a limitations period even if the injured party is unaware of the injury.¹³ Currently, however, most jurisdictions have adopted different versions of the “discovery rule” which halts the limitations period until the injured party is (or should be) aware of the incurred injury and/or its cause.¹⁴ Many jurisdictions complicate statutes of limitation analysis further by creating different rules for limitations based on the type of claim alleged. Texas, for example, appears to base a distinction upon whether an action is for property damage or personal injury. For property damage cases, the cause of action is thought to accrue on the date an injury, and not the cause, was or should have been first discovered.¹⁵ However, in Haussecker, the Texas Supreme Court appears to have varied the standard for some, if not all, personal injury actions by holding that a cause of action for a latent occupational disease does not accrue until knowledge of an injury and the injury’s cause are ascertained.¹⁶

In addition to accrual dates, other doctrines also confuse the issue of statutes of limitation. Numerous jurisdictions have adopted “the continuing tort doctrine” which will stall a statute of limitation until the last of repeated torts to is concluded. Also, alleged injuries to

children may extend the timeline of mass tort litigation because a statute of limitation usually does not begin against a child until he or she reaches the age of majority. In any event, defense attorneys should argue that an original proceeding should be viewed as notice of injury to all other parties and some of these parties will probably fail to make a timely claim.

The piecemeal approach to mass tort litigation is a popular strategy, but not without serious problems. First, it may not be a strategy at all. Piecemeal litigation may, in fact, be a default position by Defendants which have not considered other viable options as discussed below. Secondly, it may be based on the presumption mentioned earlier, to the effect that only persons who are actually injured will file a lawsuit. Most experienced attorneys know better. Word that one Plaintiff has recovered damages by verdict or settlement often acts as a “magnet,” drawing many additional Plaintiffs to the courthouse. The recent verdict in the Texas Phen-Fen trial is certain to invite future lawsuits.¹⁷ Third, the strategy presumes that the corporate Defendant employs an aggressive, organized and efficient means of defending each lawsuit in a manner that leverages the research, reports and experience so that they are useful in subsequent lawsuits. Such a situation may require a mass tort Defendant to seek more comprehensive strategies if finality is to be achieved.

Only through carefully thought out planning and strategizing by the Defendant and its attorneys, is the piecemeal strategy likely to be successful in multiple-potential-plaintiff scenarios.

2. Joinder of potential plaintiffs

Another option available to Defendants attempting to achieve litigation finality in a mass tort case is the more extensive joinder of prospective Plaintiffs. Joinder is a means by which additional parties may be added to an already pending litigation. In most jurisdictions, joinder is

ordered by the court if additional parties are deemed to be “necessary and indispensable” to a successful litigation. Under the federal rules, and many mirroring state rules, mandatory joinder is ordered if:

(1) in the person’s absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may (i) as a practical matter impair or impede the person’s ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations...¹⁸

This strategy may succeed if a court finds that either prospective Plaintiffs may be adversely affected by being absent or non-joinder will make a Defendant incur multiple or inconsistent obligations. The finding of the court in this regard will be subject to the law of the jurisdiction in which a lawsuit is originally brought and is afforded broad judicial discretion.

Joinder may also be accomplished voluntarily by all parties through collective settlement agreements. The inclusion of as many affected parties as possible in a settlement agreement may greatly enhance the prospects of finality. Settlement agreements can be used to bind prospective Plaintiffs to their terms, thereby avoiding the possibility of successive lawsuits over issues covered in the agreement. In sum, both mandatory joinder of parties as necessary litigants and inclusion of prospective Plaintiffs in a settlement will broaden the impacts of litigation and settlement and therefore increase the finality of litigation through the involvement of more parties.

3. Class certification of potential plaintiffs

Another strategy available to mass tort Defendants seeking to achieve finality is effective use of the class action procedure found in F.R.C.P. 23, and state counterparts. A class action is a procedure whereby a small number of representative parties are responsible for adjudicating the claims of all similarly situated class members. In using this process, a mass tort Defendant could conceivably join all prospective Plaintiffs in one class and handle the claims against the Defendant in one proceeding. Using the class action in this fashion could be advantageous for a Defendant because it would involve a single, unified adjudication, would prevent relitigation of the same issues, would close-off avenues for new, subsequent Plaintiffs, and a settlement with a representative party could bind a whole class of affected parties.¹⁹ However, the use of the class action could pose a great risk to a mass tort Defendant because there would be exposure to a far greater judgment should the Plaintiff class ultimately prevail.²⁰ Also, it can be very difficult for mass tort Defendants to identify a class. Ideally, the class would only include those parties that could be expected to bring a lawsuit against the Defendant. However, the extra publicity that surrounds certification of a class may notify potential litigants that would not otherwise be participants in the lawsuit. For instance, nearby residents of an industrial facility may sue the company alleging personal injuries caused by air emissions. In order to assure finality, the company may seek to certify a class of persons potential exposed to air pollutants. However, do they seek to define the class as persons living within 100 yards of the facility? One mile? Ten miles?

In order for a Defendant to have a Plaintiff class certified by the court, four basic elements must be shown. First, it must be demonstrated that joinder of all putative class members is impracticable.²¹ There appears to be a presumption in favor of class certification if

there are more than 40 parties to be joined but this decision will ultimately be an evaluation of all of the facts of the case.²² Some of the factors generally considered by the court include: the size of the potential class, the avoidance of multiplicity of actions, the geographic dispersal of potential class members, the size of individual claims, the financial resources of potential claimants, the ability of individual claimants to bring individual suits, and requests for prospective injunctive relief which would involve future class members.²³ Second, the “commonality” requirement provides that the issues involved must turn on questions of law applicable in the same manner to each member of the class.²⁴ Third, the claims brought by named Plaintiffs on behalf of the entire class must be typical of the claims of the entire class.²⁵ Finally, the representatives responsible for litigating the claims of the class must be deemed adequate to represent the interests of the entire class.²⁶ Under the federal rules and many state rules, one of the following criteria must also be met:

(1) lack of a class action would create a risk of inconsistent or varying individual adjudications which would, in turn, create incompatible standards of conduct for the parties opposing the class or would, as a practical matter, be dispositive of the interests of the other members not parties to the lawsuit; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) common questions of law predominate over individual questions and a class action is deemed superior to other methods of adjudicating the dispute²⁷

A class action approach is prone to problems caused by “opt-out” provisions common in most class action rules. Under the federal rules and many state rules, individual Plaintiffs are able to

opt-out of a class action if the class action is maintained under #3 above.²⁸ A large number of class actions are usually supported because of this option #3. Therefore, if the class action must be supported on grounds #3 and if a large number of prospective class Plaintiffs are expected to opt-out of a class action, it may prove futile for a mass tort Defendant to seek class certification of a Plaintiff class.

4. Defensive Declaratory Judgment action

A final option for mass tort Defendants seeking to achieve finality in litigation is the use of the Declaratory Judgment. A Declaratory Judgment is an action that may be brought by any party in pursuit of a judicial declaration regarding a dispute with another party. This strategy will allow a Defendant to retake some control over the process of litigation. Through a Declaratory Judgment action, a Defendant will have the opportunity to decide the parties against whom and the forum within which the Declaratory Judgment Action is to be brought. If the Declaratory Judgment action is brought proactively, a Defendant will be able to take advantage of forum collateral estoppel rules that will favor finality. Regardless of when the Declaratory Judgment Action is brought, a mass tort Defendant will be able to bring the action against all prospective Plaintiffs regarding issues of liability that are common to all Plaintiffs.²⁹ For example, a Defendant may bring a Declaratory Judgment action against as many prospective Plaintiffs over whom the court has jurisdiction regarding such general issues as contamination, defective design, and the like.

It may even be possible for some mass tort Defendants to bring an action for a Declaratory Judgment against a class of prospective Plaintiffs. Such a scenario would allow a mass tort Defendant to capitalize on the advantages that a class action would have on the prospects for litigation finality. A class action initiated by a Defendant will give this Defendant

the ability to choose the venue in which the action is to be brought. More importantly, a Declaratory Judgment Class Action would allow a Defendant to draw many expected lawsuits into one large (and hopefully final) litigation. However, the disadvantages of class action litigation in the mass tort context still apply and a Defendant must always keep these in mind.

An anticipated mass tort Defendant must show to a court that the expected Plaintiff group should be certified in the same manner as for a straightforward Plaintiff class action. The difficulty with a Declaratory Judgment Class Action is the possibility of class members opting-out of the class once it is formed, thereby defeating the purpose. The manner in which the courts would resolve this problem is unclear. The federal rules and many state rules allow class members to opt-out of a class action if the class action is justified because common questions of law predominate over individual questions and a class action is deemed superior to other methods of adjudicating the dispute (*See* ground #3, p.6).³⁰ However, an alternative ground for a class action – “when the party opposing the class has acted or refused to act on grounds generally applicable to the class or a Declaratory Judgment or an Injunction is sought by the class” (*See* ground #2, p.6) – does not allow opting-out by class members. In addressing this issue in the context of Plaintiff class actions, some courts have held that if both options are available, the latter ground for maintaining a class action is the preferred basis because of the greater finality it will achieve.³¹

Some courts have suggested that a Defendant class action paired with a Declaratory Judgment action may be upheld under ground #2, thereby preventing a class of prospective Plaintiffs from opting-out. Ground #2 is questionably applied to this mass tort context because it requires a “Declaratory Judgment ... *sought by the class,*” not sought by a party opposing the class.³² Judge Posner of the Ninth Circuit avoids this textual problem by arguing that a pure

textual reading doesn't make sense because the roles of Plaintiff and Defendant are commonly switched-around in a Declaratory Judgment action. Posner has stated that: "[the non-opt-out ground (#2)] speaks of declaratory as well as injunctive relief, and in a declaratory judgment action the parties frequently get reversed ... In such a case [a non-opt-out] class might

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In practice, class certification has been used as a means of broadly resolving Declaratory Judgment claims brought by an anticipated Defendant. In *Blake*, two Yurok Indians brought suit against landowners for a declaration that they had rights to enter and cross the Defendants' land to exercise Yurok hunting and fishing rights. The Defendant landowners counterclaimed seeking a Declaratory Judgment negating any Indian hunting and fishing rights on their land and sought to join all Yurok Indians, as well as neighboring Hoopa Indians as a class of cross-Defendants. The court certified the Yurok Indians as a Defendant class to a Declaratory Judgment but rejected inclusion of the Hoopas in this class because the original plaintiffs who would act as representatives were Yuroks and there was a historical conflict of interest between the two tribes.³⁴

A Need for Improved Litigation Strategies

The current method of litigation of mass torts does not appear to promote finality of judgments. The current problems are two-fold: (1) the litigation of mass torts by many Defendants is not carefully planned and (2) litigation is not always conducted with enough potency. Litigation of mass torts requires a carefully planned and well-prepared strategy and attack. Decisions that are made very early in the process have the potential to benefit (or plague) a litigant throughout the duration of a case (or series of cases). Similarly, the vigor with which a Defendant undertakes the litigation of a mass tort will not only influence the success of the case actually litigated but

also the chances of further litigation in the future. If a Defendant litigates half-heartedly or settles prematurely, the chances of this Defendant undertaking litigation against “bandwagon” Plaintiffs in the future greatly increase.

This article hopefully makes clear the problems of recurrent litigation that currently confront all forms of business. However, it is also apparent that there are options presently available to a mass tort Defendant in combating mass tort claims with prospects for litigation finality.

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- ¹ *Cox v. Shell Oil Co.*, 1995 WL 775363, *3-4 (Tenn. Ch. 1995).
- ² *Access, Equity, and Finality of Adjudication: the Role of Class Actions in our Civil Justice System: Oversight Hearing on Mass Torts and Class Action Lawsuits Before the Subcommittee on Court and Intellectual Property of the House of Rep. Comm. on the Judiciary*, 3/5/98 (statement of Elizabeth J. Cabraser, class action attorney).
- ³ See *In re General Motors Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 779 (3d Cir. 1995), cert. denied sub. nom., *General Motors Corp. v. French*, 516 U.S. 824, 116 S.Ct. 88 (1995).
- ⁴ *Amchem Products, Inc. v. Windsor*, 117 S.Ct. at 2253 (1997); *In re Joint Eastern and Southern Dist. Asbestos Litigation*, 129 B.R. 710, 936-37 (E.D.N.Y. and S.D.N.Y. 1991).
- ⁵ *Amchem*, 117 S.Ct. at 2253 (citing Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, at 10-11 (March 1991)).
- ⁶ *Cimino v. Raymark Indus.*, 751 F.Supp. 649, 651-52 (E.D. Tex. 1990).
- ⁷ *In re Joint Eastern and Southern Dist. Asbestos Litigation*, 129 B.R. at 751.
- ⁸ *Ortiz v. Fibreboard Corporation*, No. 97-1704, 1999 WL 412604 (U.S. June 23, 1999).
- ⁹ *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328, 99 S.Ct. 645, 649-50 (1979) (abandoning mutuality requirement in cases of offensive collateral estoppel); *Fate v. Dixon*, 649 F.Supp. 551, 559-60 (E.D. N.C. 1986) (stating that when offensive collateral estoppel is contemplated, the courts must use special care to ensure that its use will not lead to unjust results).
- ¹⁰ *Parklane*, 439 U.S. at 328, 99 S.Ct. at 649-50 (abandoning mutuality requirement in cases of offensive collateral estoppel); *Blonder-Tongue Laboratories v. Univ. of Illinois Found.*, 402 U.S. 313, 349-50, 91 S.Ct. 1434, 1453 (1971) (abandoning mutuality in cases of defensive collateral estoppel); *Aufderhar v. Data Dispatch, Inc.*, 452 N.W.2d 648, 650-51 (Minn. 1990).
- ¹¹ *Sun Finance Co. v. Jackson*, 525 So.2d 532, 533-34 (La. 1988).
- ¹² *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971).
- ¹³¹³ *Harper v. Harper*, 252 F. 39 (4th Cir. 1920); *French v. U.S. Fidelity & Guaranty Co.*, 88 F.Supp. 714, 723-24 (D. N.J. 1950).
- ¹⁴ *Hoult v. Hoult*, 792 F.Supp. 143, 144 (D. Mass. 1992) (citing *Bowen v. Eli Lilly Co.*, 557 N.E.2d 739, 740-42 (1990)); *Bennett v. U.S.*, 36 Fed. Cl. 111 (Ct. Cl. 1996).
- ¹⁵ *Mitchell Energy Corp. v. Bartlett*, 958 S.W.2d 430, 436 (Tex. App.--Fort Worth 1997, pet. denied).
- ¹⁶ *Childs v. Haussecker*, 974 S.W.2d 31, 33 (1998).
- ¹⁷ An East Texas jury awarded \$23.4 million in damages on August 6, 1999 to Deborah Lovett.
- ¹⁸ Fed. R. Civ. P. 19(a).
- ¹⁹ Newberg on Class Actions § 7509 (4th Ed. 1977).
- ²⁰ *Id.*
- ²¹ *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 680-82 (S.D. Ca. 1999).
- ²² Newberg on Class Actions § 3-12 (Supp. 1998).
- ²³ *Id.* at § 3-27.
- ²⁴ *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).
- ²⁵ Newberg on Class Actions § 3.
- ²⁶ *Id.*
- ²⁷ Fed. R. Civ. P. 23(b).
- ²⁸ Fed. R. Civ. P. 23(c)(2).
- ²⁹ *In re Copley Pharmaceutical Co. "Albuterol" Products Liability*, 161 F.R.D. 456, 463-70 (D. Wyo. 1995) (denying Defendant's motion for decertification and establishing trial plan for class trial of common liability issues and individual trials of remaining issues of causation, injury, and damages); *In re Telectronics Pacing Systems, Inc. v. Accufix Atrial "J" Leads Products Liability Litigation*, MDL-1057 (S.D. Ohio 1997) (certifying common liability issues raised by medical monitoring, strict liability, and negligence claims); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 311 (5th Cir. 1998) (decertifying class in personal injury case because failing to try individual causation and damages was held a violation of the Seventh Amendment).
- ³⁰ Fed. R. Civ. P. 23(b).
- ³¹ Wright & Miller, Federal Practice & Procedure § 1775 (1998) (citing *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 447 (5th Cir. 1973)).
- ³² Fed. R. Civ. P. 23(b) (emphasis added).
- ³³ *Henson v. East Lincoln Township*, 814 F.2d 410, 414 (7th Cir. 1987).
- ³⁴ *Blake v. Arnett*, 663 F.2d 906, 911-13 (9th Cir. 1981).