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Numerosity Analysis Fix Can Improve Class Cert. Decisions

By **Bennett Rawicki** (July 28, 2020, 3:53 PM EDT)

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The first prerequisite for class certification is, according to Federal Rule of Civil Procedure 23(a)(1), a class "so numerous that joinder of all members is impracticable."[1]

If joinder is practicable, there is no need for a class action, which the U.S. Supreme Court emphasized is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only" in Wal-Mart Stores Inc. v. Dukes in 2011.[2]

Numerous cases have analyzed numerosity, creating elaborate multifactor tests in the process.[3] As this case law has developed, it has become untethered to the text of Rule 23. There is a trend of courts analyzing numerosity without remembering that the inquiry concerns joinder, not individual suits, and practicality, not formalism. Returning to the text will remedy four errors and refocus the numerosity analysis on the critical question: whether joinder is practicable.

Analyzing Members of the Putative Class That Have Already Sued

Take the situation where multiple members of a putative class have already filed complaints before the court decides certification. Since those entities have already sued, it makes sense to discount them when determining the count of class members who would need to be joined if the court denied certification. To use an extreme example that the U.S. Court of Appeals for the Fourth Circuit considered in Roman v. ESB Inc. in 1976, if 44 of 53 putative class members already brought suit, joining the remaining nine would not be impracticable.[4]

More recently, several courts have overlooked the practicality required in the numerosity analysis by counting entities that already sued in the number that would need to be joined if certification were denied. The U.S. District Court for the Southern District of New York reasoned in MacNamra v. City of New York in 2011:

> Defendants supply no authority for the proposition that the existence of parallel actions should automatically reduce the number of prospective class members for purposes of the class certification inquiry.[5]

This court and others have viewed the entities that already sued through the lens of whether they would opt out. Some courts find an existing lawsuit as sufficient evidence they would opt out.[6] Others

do not.[7] But that is the wrong question.

Although the number of opt outs reduces the number of class members, it does not answer whether, in the absence of a class at all, joinder of those who qualify as class members would be practicable. That is the right question according to Rule 23's text.

The proper, practical way to consider members of the putative class that have already sued is to discount the difficulty of joining them to the lawsuit if the court did not certify the class. Otherwise, courts would be treating a current plaintiff the same as an entity across the country that has never heard of the lawsuit. The numerosity analysis demands more practicality than that.

Analyzing Members of the Putative Class That Share a Common Decision Maker

In some class actions, there are separate legal entities that each suffered the alleged injury but that also share the same decision maker. This could be a company that purchased the allegedly overpriced product and then was acquired by another class member. Or it could be a mother and her children exposed to the same pollutant.

Although the subsidiary and the children are distinct class members in the formal sense, courts have been mistakenly considering them distinct when deciding whether joinder would be practicable.

This error has arisen in multiple antitrust class actions, including In re: Loestrin, In re: Namenda and In re: Solodyn.[8] In each case the court stopped its inquiry after deciding that the subsidiaries were distinct class members because they made purchases of the allegedly overpriced products separate from their corporate parents' purchases. In none did the court consider whether the subsidiaries would actually make different litigation decisions.

The defendants in In re: Niaspan raised the correct point, arguing: "As a practical matter, [p]arents and subsidiaries will not make different litigating decisions because they have a 'unity of interests.'"[9]

The court unfortunately did not engage with this argument. It stated only that the plaintiffs "correctly note that courts have consistently rejected this argument."[10] The court mistakenly believed those other courts had addressed the unity-of-interests argument, and thus followed them.

The proper, practical approach is to consider the number of decision makers when determining whether joinder is practicable. Just as a referee views the World Cup as 32 teams rather than hundreds of players, courts should view the group of class members through the lens of how many decision makers (or teams) there really are.

Weighing the Efficiency of a Class Action Against That of Individual Suits

Another departure from Rule 23's text rears its head when courts consider judicial economy. Courts appropriately consider the efficiencies and burdens on the courts and parties when determining practicability of joinder. The problem is that several courts forget that the question is practicability of joinder. They consider the practicability of individual suits.

For example, in Meijer Inc. v. Warner Chilcott Holdings Co. III in 2007, the U.S. District Court for the District of Columbia reasoned that judicial economy favored class certification because the alternative was 30 individual actions.[11] The U.S. District Court for the District of Massachusetts certified a class

in In re: Nexium Antitrust Litigation in 2013 because it believed the alternative was "litigating the same exact claims in multiple courts across the country."[12]

Properly understood, the judicial economy inquiry is whether a class action is more economical than the putative class members joined in one suit.[13] A class action and a joined action each have their administrative burdens, and that is what litigants should be briefing and courts should be deciding.

Considering the Cost of Litigating Individual Suits Rather Than a Joined Action

A fourth fault some courts make is to consider the cost to putative class members if each had to sue individually. This is relevant to the factor whether, in the absence of a class action, the putative class members would have the ability and motivation to pursue their claims.[14]

Most courts correctly account for the likelihood that, in a joined suit, the putative class members would share costs.[15] But a few courts have compared each class member's claim amount against the cost for each class member to litigate individually.[16]

And class counsel continue to argue this when seeking certification.[17] Courts should disregard it. The proper approach when considering practicability of joinder is the cost of joining an action, not litigating independently.[18]

Conclusion

By retethering to the text of Rule 23, courts can avoid the four errors explained above and focus the numerosity inquiry on what matters: whether joinder is practicable.

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[1] Fed. R. Civ. Proc. 23(a)(1).

[2] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348 (2011).

[3] See, e.g., In re Modafinil Antitrust Litig., 837 F.3d 238, 252 (3d Cir. 2016); Ibe v. Jones, 836 F.3d 516, 528 (5th Cir. 2016); Pa. Pub. Sch. Emps.' Ret. Sys. v. Morgan Stanley & Co., 772 F.3d 111, 120 (2d Cir. 2014).

[4] Roman v. ESB, Inc., 550 F.2d 1343, 1348 (4th Cir. 1976) (en banc).

[5] MacNamara v. City of New York, 275 F.R.D. 125, 142 (S.D.N.Y. 2011).

[6] See, e.g., Day v. Whirlpool Corp., No. 13-CV-2164, 2014 WL 12461378, at *4 (W.D. Ark. Dec. 3, 2014) (relying on separately filed actions as evidence those putative class members would opt out); King Drug Co. v. Cephalon, Inc., No. 06-CV-1797, Dkt Nos. 833-1 & 841 (E.D. Pa. 2015) (granting plaintiffs' request to exclude entities from the class definition based on the argument those entities had already sued and

thus would opt out).

[7] See, e.g., MacNamara, 275 F.R.D. at 142; In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-MD-2503, 2017 WL 4621777, at *5 (D. Mass. Oct. 16, 2017) ("The Court also declines to adopt Defendants' position that five purchasers' filing separate complaints compels the conclusion that they would opt-out of the class, if certified.").

[8] See In re Loestrin 24 FE Antitrust Litig., No. 13-MD-2472, 2019 WL 3214257, at *10 (D.R.I. July 2, 2019); In re Namenda Direct Purchaser Antitrust Litig., 331 F. Supp. 3d 152 (S.D.N.Y. 2018); Solodyn, 2017 WL 4621777, at *4. See also Am. Sales Co., LLC v. Pfizer, Inc., No. 14-CV-361, 2017 WL 3669604 (E.D. Va. July 28, 2017), report and recommendation adopted, 2017 WL 3669097 (E.D. Va. Aug. 24, 2017).

[9] In re Niaspan Antitrust Litig., 397 F. Supp. 3d 668, 677 (E.D. Pa. 2019) (quoting Defendants' brief) (internal quotation marks omitted). See also Solodyn, No. 14-MD-2503, Dkt. 611 at 21 (July 21, 2017) (opposition brief to class certification argued, "DPPs provide no basis to believe it would be impracticable for corporate affiliates not to join together in litigation.").

[10] Niaspan, 397 F. Supp. 3d at 677.

[11] Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. 293, 307 (D.D.C. 2007).

[12] In re Nexium (Esomeprazole) Antitrust Litig., 296 F.R.D. 47, 51 (D. Mass. 2013); Am. Sales, 2017 WL 3669604, at *10.

[13] See Modafinil, 837 F.3d at 253–57 ("At this point, we do not consider the possibility that plaintiffs may bring individual suits. After all, the text of Rule 23(a)(1) refers to whether "the class is so numerous that joinder of all members is impracticable," not whether the class is so numerous that failing to certify presents the risk of many separate lawsuits. (footnote omitted)).

[14] See, e.g., Modafinil, 837 F.3d at 253 (holding that "judicial economy and the ability to litigate as joined parties are of primary importance" in considering practicability of joinder); Niaspan, 397 F. Supp. 3d at 677 (same); In re Solodyn, 2017 WL 4621777, at *5 (same).

[15] See, e.g., Modafinil, 837 F.3d at 257–58; Niaspan, 397 F. Supp. 3d at 677–78; In re Androgel Antitrust Litig., No. 09-MD-2084, 2018 WL 3424612, at *3 (N.D. Ga. July 16, 2018); King Drug Co. of Florence, Inc. v. Cephalon, Inc., No. 06-CV-1797, 2017 WL 3705715, at *10 (E.D. Pa. Aug. 28, 2017).

[16] See, e.g., In re Lidoderm Antitrust Litig., No. 14-MD-2521, 2017 WL 679367, at *14 (N.D. Cal. Feb. 21, 2017) (relying on expert report that argued "44 DPPs have claims worth less than it would realistically cost to litigate an expert– and discovery-intensive case like this one"); Hernandez v. Wells Fargo Bank, N.A., No. 18-CV-7354, 2020 WL 469893, at *3 (N.D. Cal. Jan. 29, 2020); In re Intuniv Antitrust Litig., No. 16-CV-12653, 2019 WL 4645502, at *4 (D. Mass. Sept. 24, 2019), overturned on other grounds, 2020 WL 3840901 (July 8, 2020); Am. Sales, 2017 WL 3669604, at *10.

[17] See, e.g., In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig., No. 17-MD-2785, 2020 WL 1180550, at *22 (D. Kan. Mar. 10, 2020) (arguing, successfully, that the claim amounts were less than the cost "if individual members are forced to take on defendants alone").

[18] See, e.g., Modafinil, 837 F.3d at 257–58 ("[T]he numerosity rule does not envision the alternative of individual suits; it considers only the alternative of joinder.").