Product Liability Class Action Lawsuits: A Primer and Recent Trends

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Introduction

Courts are continuing to address the complexities presented with the administration of mass product liability lawsuits. Often these cases involve a single product or component that causes injury to hundreds or thousands of individuals. However, the individual litigation of similar claims begs the question as to whether a more efficient means is available for the treatment of these claims. Class action lawsuits are a vehicle through which many claims may be simultaneously tried, as long as the claims meet the statutory requirements of Rule 23. Recent Minnesota Federal District and State Court decisions have provided guidance as to how the Courts can address these claims through class actions.

Satisfying the Requirements

Plaintiffs do not maintain the right to litigate a case as a class action. Rather, plaintiffs must demonstrate their satisfaction of all four requirements of Rule 23.01 of the Minnesota Rules of Civil Procedure, and at least one of three factors of Rule 23.02, to achieve class status. *Glen Lewy 1990 Trust v. Investment Advisors, Inc.*, 650 N.W.2d 445, 451-52 (Minn. Ct. App. 2002); *Streich v. American Fam. Mut. Ins. Co.*, 399 N.W.2d 210, 213 (Minn. Ct. App. 1987). According to Rule 23.01, "one or more members of a class may sue or be sued as representative parties on behalf of all if:

a) The class is so numerous that joinder of all members is impracticable;
b) There are questions of law or fact common to the class;

c) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
d) The representative parties will fairly and adequately protect the interests of the class."

Minn. R. Civ. P. 23.01 (2002). Respectively, these factors are commonly referred to as numerosity, commonality, typicality and representivity. *Streich,* 399 N.W.2d at 213. In the second part of the test, Rule 23.02 provides that:

> An action may be maintained as a class action if the prerequisites of Rule 23.01 are satisfied, and in addition:
> a) The prosecution of separate actions by or against individual members of the class would create a risk of
> 1. Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> 2. Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not party to the adjudications or substantially impair or impede their ability to protect their interests; or
> b) 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
> c) 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:
> 1. The interests of members of the class in individually controlling the prosecution or defense of separate actions;
> 2. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> 3. The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> 4. The difficulties likely to be encountered in the management of a class action.

Minn. R. Civ. P. 23.02 (2002).

Additional Class Certification Considerations

Under Rule 23.03(a) of the Minnesota Rules of Civil Procedure, a court must determine the issue of class certification "as soon as practicable" after commencement of the action. The

court may grant certification after a 'rigorous analysis' suggests that all of Rule 23's requirements are satisfied. *Lockwood Motors, Inc. v. Gen. Motors Corp.*, 162 F.R.D. 569, 573 (D. Minn. 1995) *citing Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974) (explaining that courts do not have authority to "conduct a preliminary inquiry into the merits of a suit in determining whether it may be maintained as a class action."); *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 688 (D. Minn. 1995); *Powell v. National Football League*, 711 F. Supp. 959, 968 (D. Minn. 1989); *McMerty v. Burtness*, 72 F.R.D. 450, 455 (D. Minn. 1976).

In the court's evaluation of a claim, it may choose to only consider evidence that is material to the issue of class certification. *Lockwood Motors*, 162 F.R.D. at 573; *Potash*, 159 F.R.D. at 688; *In re Data Corp. Securities Litig*., 116 F.R.D. 216, 219 (D. Minn. 1986). However, the trial court should resolve any doubt regarding the wisdom of class certification "in favor of allowing the class action," since it is well established that class action lawsuits are designed to be effective tools for deterring wrongdoing. *Potash*, 159 F.R.D. at 688; *In re Data Corp. Securities Litig.*, 116 F.R.D. 216, 219 (D. Minn. 1986).

Trial courts have considerable discretion in determining whether a class action may be maintained. *See Forcier v. State Farm Mut. Auto Ins. Co*., 310 N.W.2d 124, 130 (Minn. 1981). In exercising this discretion, the court may be mindful that a class action might be the only practical vehicle for the vindication of small claims. *Forcier*, 310 N.W.2d at 130. Despite this consideration, however, plaintiffs in products liability litigation have historically born a heavy burden in gaining recognition as a class. Martin L.C. Feldman, *Predominance and Products Liability Class Actions: An Idea Whose Time Has Passed?*, 74 Tulane L. Rev. 1621, 1625 (2000). The general predominance of individualized issues has discouraged courts from certifying single-state and nationwide class actions in products liability cases. *Id.*

Federal Courts' Historical Favoritism of Individual Treatment of Products Liability Cases

The prevalence of individualized claims is one of many factors causing courts' hesitancy to certify class action claims. Congress' promulgation of Rule 23 in 1938 originally facilitated the bringing of class action lawsuits for damages. However, criticism of the Rule resulted in Congress' amendment of its language in 1966. The Rule has not been subsequently amended; however, legislative reform is proposed on a yearly basis.

Contrary to the effect of the former version of Rule 23, its modern interpretation makes it increasingly difficult for plaintiffs to achieve class certification. Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 17:2 (4th ed. 2002) (Newberg). The 1968 amendments to Minnesota Rule 23 closely followed the 1966 amendments. See David F. Herr & Roger S. Haydock, 1 Minn. Prac., Civil Rules Ann. R 23 (4th ed. 2003). For this reason, Minnesota appellate courts have followed federal precedent in construing the class action rule, and subsequently faced similar obstacles to class action certification as federal claims. *See, e.g., Gordon v. Microsoft Corporation*, 645 N.W.2d 393, 400 (Minn. 2002); *Johnson v. Soo Line R.R.*, 463 N.W.2d 894, 899 n.7 (Minn. 1990); *In re Objections and Defenses to Real Prop. Taxes*, 335 N.W.2d 717, 719 (Minn. 1983); *Lewy 1990 Trust v. Investment Advisors, Inc.*, 650 N.W.2d at 452.

Obstacles to Class Certification

In support of class certification denial, courts often rely on the 1966 Advisory Committee Note that states:

> A mass tort accident resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances, an action conducted nominally as a class action would degenerate in practice into multiple lawsuits tried separately.

Newberg at § 17:2 (citing Fed. R. Civ. Pro. 23, 1966 Advisory Committee Note).

In addition to courts' reliance on the Advisory Committee Note, they may also justify denial on various other grounds. First, some judges believe cases involving "death or severe injury should permit plaintiffs control over their own litigation." Id. at § 17:2. Second, some judges believe class actions encourage unethical solicitation. Id. Third, several courts believed settlements in class actions "may be delayed because Rule 23(e) requires court approval before any settlements or voluntary dismissals are made in a class litigation context." Id. Similarly, "courts have acknowledged the increased pressure to settle that is placed upon defendants faced with enormous potential liability due to class certification." Heather M. Johnson, *Resolution of Mass Products liability Litigation Within the Federal Rules: A Case for the Increased Use of Rule 23(B)(3) Class Actions*, 64 Fordham L. Rev. 2329, 2351 (1996). Fourth, some courts consider "tort cases [as] inherently too complex or contain[ing] too many choice of law problems to afford class treatment." *Id.* (stating that "in mass products liability actions [involving] laws of various states, the Erie doctrine create a significant obstacle to employing a uniform negligence law"). Finally, several courts criticized class actions as failing to provide final resolutions to claims, since they allowed individuals to "opt out and bring individualized claims." *Id.* at 2355.

The Feasibility of Class Certification in Minnesota

"The last two decades have seen an explosion in mass tort litigation." 1 Newberg § 1.1 (4th ed.). In fact, "mass tort class actions [have] rapidly emerged as a permanent part of the landscape for claims flowing from negligent acts or defective or toxic products affecting groups of similarly situated parties." 5 Newberg § 17.5. "[Some] courts are now abandoning [their] reluctance to certify mass tort class actions in light of what is often an overwhelming need to create an orderly, efficient means for adjudicating hundreds or thousands of related claims."

Newberg at 17:5. Still, others remain reluctant to certify classes with products liability claims because they perceive individual issues predominate over those shared by potential class members. Recent Minnesota decisions suggest an increasing amenability to class certification for products liability claims.

Satisfying the Requirements of Rule 23.1 of the Minnesota Rules of Civil Procedure

Numerosity

Although the numerosity of a class is prerequisite for certification, precise enumeration of the members of a class is not necessary for the class to proceed as a class action. *Rains v. City of Minneapolis, Minnesota*, 1991 WL 238262 at *3 (D. Minn. 1991): *Chutich v. Green Tree Acceptance, Inc.*, 1990 WL 82385 at *3 (D. Minn. 1990); *Hedge v. Lyng*, 689 F. Supp. 884, 889 (D. Minn. 1987). Rather, plaintiffs must only show that the class is "so numerous that joinder of all members is impracticable." Minn. R. Civ. P. 23.01(a). Impracticability of joinder does not mean impossibility, but rather inconvenience to the court. *Chutich*, 1990 WL 82385 at *3.

Minnesota courts have held that classes as small as 40 persons are sufficient to meet the numerosity requirement. *Klicker v. Minnesota*, 197 N.W.2d 434, 437 (Minn. 1972).
In addition, where class members are geographically dispersed, the numerosity requirement is even more easily satisfied because joinder becomes increasingly impractical as the number of class members rises. *Boyd v. Ozark Airlines*, 568 F.2d 50, 55 (8th Cir. 1977). In *Glen Lewy 1990 Trust,* the Court of Appeals noted that where the claims of plaintiffs numbering in the hundreds are at issue, joinder is almost always impracticable and held that a "good faith estimate" of a potential class of 1,000 clearly meets the numerosity requirement. *Glen Lewy 1990 Trust*, 650 N.W.2d 452-53.

Commonality

Plaintiffs may meet the commonality requirement, making class certification appropriate, when the record demonstrates that numerous common questions of law and fact are present, the same conduct of the defendant harmed all the members in the putative class, and the questions of law and fact surrounding the defendant's conduct are identical for all members of the class. The threshold for finding commonality is "not high." *Peterson*, 618 N.W.2d at 825. Plaintiff's attorneys may indicate that "it requires only that the resolution of the common questions affect all or a substantial number of class members." *Glen Lewy 1990 Trust*, 650 N.W.2d at 453 (citing *Jenkins v. Raymark Indus, Inc.*, 782 F.2d 468, 472 (5th Cir. 1986)); *Streich*, 399 N.W.2d at 214. However, defense attorneys may alternatively argue that when the "defendant's conduct means different things for different class members, trying the issue of the [defendant's] liability for that conduct on an aggregated basis is problematic." *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 220 (E.D. La. 1998). A requirement that the common question affect only a substantial number of class members, instead of every member, may also pose problems since "substantial" is a subjective measure, and class certification is inappropriate when "many individuals included in the purported class have sustained no injury in fact." *McElhaney v. Eli Lilly & Co.*, 93 F.R.D. 875, 878 (D. S.D. 1982).

It is instructive to note that Rule 23.01(b) only requires "questions of law or fact common to the class." In addition, commonality is not negated by the presence of factual differences among class members. *Minnesota Dept of Human Rights v. Hibbing Taconite Co.*, 482 N.W.2d 504, 506 (Minn. Ct. App. 1992); *McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 854 (Minn. 1985). Rather:

> The rule does not require that every question of law or fact be common to every member of the class, and may be satisfied, for example, where the question of law

> linking the class member is substantially related to the resolution of the litigation even though the individual [class members] are not identically situated.

Paxton v. Union Nat'l Bank, 688 F.2d 552, 561 (8th Cir. 1982) (internal citations omitted), *cert. denied*, 460 U.S. 1083 (1983). Plaintiffs may not, however, satisfy the classwide proof burden simply by stating that the alleged defect or product "systematically" harmed all the plaintiffs, without providing additional information to satisfy the prerequisites to class certification. *Reinholdson v. Minnesota*, No. 02-795, 2002 WL 31026580, at *8 (D. Minn. Sept. 9, 2002).

Typicality

In addition plaintiffs' demonstration of numerosity and commonality, the claims of each class member must also be typical of those of his fellow class members. Specifically, the typicality inquiry focuses on whether the representative plaintiff has an interest that is compatible with those of the putative class, and whether there is any potential for conflict between the class representative and the class as a whole. *Streich*, 399 N.W.2d at 215. The court's liberal application of this requirement further facilitates the finding of typicality under Rule 23.01.

The typicality requirement functions jointly with the requirement of adequate representation "to insure that the claims of the class members are fully presented and vigorously prosecuted." *Glen Lewy 1990 Trust*, 650 N.W.2d at 453. A class representative's claim is typical "if the claims or defenses of the representative and the members of the class stem from a single event or are based on the same legal or remedial theory." *Paxton*, 688 F.2d at 561-62; *Donaldson v. Pillsbury Co*., 554 F.2d 825, 831 (8th Cir. 1977), *cert. denied,* 434 U.S. 856 (1977). As long as the claims arise "out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment." *Donaldson*, 554

F.2d at 831; *see also: White v. Nat'l Football League*, 822 F. Supp. 1389, 1404 (D. Minn. 1993), *aff'd* 41 F.3d 402 (8th Cir. 1995), *cert. denied,* 515 U.S. 1137 (1995).

The typicality requirement is designed to align the interest of the class and the class representatives, so that the latter will work to benefit the entire class though the pursuit of their own goals. However, attorneys defending class actions may argue in cases involving both named and as-yet uninjured plaintiffs, "the fact that the [named] plaintiff claims to be injured, in and of itself, appears to make her atypical of the class." *Wall v. Sunoco, Inc.*, 211 F.R.D. 272, 278 (M.D. Pa 2002). Contrary to this position, plaintiff's attorneys still contend that the typicality requirement is met where they have the same or similar grievance with the defendant. *Donaldson*, 554 F.2d at 831; *see also: White v. Nat'l Football League*, 822 F. Supp. 1389, 1404 (D. Minn. 1993), *aff'd* 41 F.3d 402 (8th Cir. 1995), *cert. denied,* 515 U.S. 1137 (1995).

In *Glen Lewy 1990 Trust*, the Court of Appeals made the following observation:

> The district court, relying on its numerosity finding, ruled that by failing to show that other class members exist, the trustees necessarily failed to show that their claim is typical of the proposed class. We disagree. First, the trustees cannot reasonably be expected to show that other class members exist when they have been denied discovery aimed at this specific purpose. But even without the discovery, the record adequately demonstrates the similarity of claims and alignment of interests. The trustees' claims are typical of the potential class because both are based on the identical legal theory--breach of fiduciary duty--and both arise from the same facts--the distribution of unusually large short-term capital gains in 2000 and the information or lack of information relating to capital gains in the prospectus outlining the transaction with Federated. No evidence suggests that the trustees have a conflict or a misalignment with the interests of the putative class. The trustees' claims are typical of the proposed class claims.

Glen Lewy 1990 Trust, 650 N.W.2d at 453.

Representivity

The representivity requirement of Rule 23.01(d) "means the representative parties interests must coincide with the interests of other class members and the parties and their counsel

will competently and vigorously prosecute the lawsuit." *Glen Lewy 1990 Trust*, 650 N.W.2d at 454; *Streich*, 399 N.W.2d at 215. Factors used to determine if representivity is satisfied include: (1) whether the representatives' interests are sufficiently identical to those of absent class members so that the representatives will vigorously prosecute the suit on their behalf; (2) whether the plaintiffs' attorneys are qualified, experienced and capable of conducting the litigation; and (3) whether the representatives have any interests in conflict with the objective of the class they represent. *Id.*

Satisfying Rule 23.02

In addition to satisfying the requirements of rule 23.01, a proposed class action must also come within one of three categories set forth in Minn. R. Civ. P. 23.02. *Glen Lewy 1990 Trust*, 650 N.W.2d at 455. One of these alternatives is set forth in Rule 23.02 (c), which states a class action may be maintained if two basic conditions are met. First, common questions must predominate over individual issues, and second, the class action must be superior to other available methods for the fair and efficient adjudication of the controversy. *Id.*

To determine whether common questions predominate over individual issues, the Court must analyze "the elements which the plaintiff must establish in order to recover on the claim against the defendant." *Streich*, 399 N.W.2d at 217. To predominate, the common questions must constitute a "significant part of the individual cases." *Id.* If the generalized evidence will prove or disprove an element of the case on a simultaneous, class-wide basis that would not require examining each class member' s individual position, then this requirement is met. *Glen Lewy 1990 Trust*, 650 N.W.2d at 455-56.

> [P]redominance will be found where generalized evidence may prove or disprove elements of a claim. *In re Hartford Sales Practices Litig.,* 192 F.R.D. 592, 604 (D. Minn. 1999) (citation omitted). As with the commonality and typicality requirements, the predominance inquiry is directed toward the issue of

> liability. "When determining whether common questions predominate courts 'focus on the liability issue * * * and if the liability issue is common to the class, common questions are held to predominate over individual questions.'" *Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 114 F.R.D. 48, 52 (S.D.N.Y.1987) (quoting *Dura Bilt Corp. v. Chase Manhattan Corp.,* 89 F.R.D. 87, 93 (S.D.N.Y.1981)); *see also Lockwood Motors,* 162 F.R.D. at 580 (" 'the fundamental question is whether the group aspiring to class status is seeking to remedy a common legal grievance '") (quoting 3B *Moore's Federal Practice* § 23.45 at 23-306 to -07 (2d ed.1994). Thus, we look first to the elements necessary to recover on the claim against IAI. To predominate, common issues must constitute a significant part of the individual cases. *Streich v. Am. Family Mut. Ins. Co.,* 399 N.W.2d 210, 217 (Minn. Ct. App. 1987), *review denied* (Minn. Mar. 25, 1987).

Id.

It is well established that disparate facts relating to individual class members' damages do not preclude a finding that common issues predominate for the purpose of class certification. *In re Telectronics,* 172 F.R.D. at 287-88; *Bokusky v. Edina Realty, Inc.,* 1993 WL 515827 at *3 (D. Minn. 1993); *Blackie v. Barrack,* 524 F.2d 891, 905 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976). In fact:

> No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action. Consequently, the mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible.

In re Telectronics, 172 F.R.D. at 287-88 (quoting *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1196-97 (6th Cir. 1988)).

The literal language of the Rule 23.02(c) requirement that common questions predominate over individual issues contemplates that questions peculiar to individual class members will usually remain after the common issues are adjudicated and courts frequently grant class certification despite individual differences in class members' damages. *Glen Lewy 1990 Trust*, 650 N.W.2d at 456-57. In *Glen Lewy 1990 Trust*, the Court of Appeals specifically

reversed the trial court's findings that the difference in damages among the members precluded class certification.

A Class Action May Be Superior To Other Available Methods For Fair And Efficient Adjudication in Minnesota

In determining whether a class action is superior to other available methods of adjudication, the Court must consider manageability, fairness, efficiency, and available alternatives. *Streich*, 399 N.W.2d at 218. With respect to the issues of manageability and efficiency, Minnesota courts ordinarily do not rely on potential procedural difficulties as a basis for denying class certification because the trial court has broad powers to alleviate any procedural problems that may arise. *Id.* In *Glen Lewy 1990 Trust*, the Minnesota Court of Appeals made the following comments on this issue.

> The class action is most often needed in litigation in which individual claims are small. *Forcier v. State Farm Mut. Auto. Ins. Co.,* 310 N.W.2d 124, 130 (Minn. 1981). When collective adjudication promises substantial efficiency benefits or makes it possible for class members with small claims to bring suit and enforce the substantive law, a class action is superior to other available methods for the fair adjudication of the controversy. *See Vernon J. Rockler & Co. v. Graphic Enter., Inc.,* 52 F.R.D. 335, 347 (D. Minn. 1971) (" '[a] class action must be deemed the only practical method of litigating * * * when the complex nature of the litigation and the comparatively small individual financial interests are considered' ") (quoting *Weiss v. Tenney Corp.,* 47 F.R.D. 283, 291 (S.D.N.Y.1969)). 2002 WL 2005190 at page 8.

Glen Lewy 1990 Trust, 650 N.W.2d at 457.

In consideration of fairness and efficiency, Minnesota courts have overwhelmingly recognized that the purpose of the class action is to "take care of the smaller guy," and "is most needed in consumer suits where individual claims are small." *Id; see also, Forcier v. State Farm Mut. Automobile Ins. Co*, 310 N.W.2d 124, 130 (Minn. 1981) (where potential recovery is too small to justify individual action, class action is appropriate); *Rathbun v. W.T. Grant Co.*, 219

N.W.2d 641, 653 (Minn. 1974) (members of class entitled to recover since it is unreasonable to assume that they will all litigate their claims individually). One legal commentator observed:

> The case-by-case mode of adjudication magnifies this burden [of litigating complex issues] by requiring the parties and court to reinvent the wheel for each claim. The merits of each case are determined de novo even though the major liability issues are common to every claim arising from the mass tort accident, even though they may have been previously determined several times by full and fair trials. These costs exclude many mass tort victims from the system and sharply reduce the recovery for those who gain access. Win or lose, the system's private law process exacts a punishing surcharge from defendant firms as well as plaintiffs.
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> In addition, the case-by-case, individualized processing of the mass tort claims that are filed confers a strategic edge upon defendant firms. While it prevents victims from deriving the benefits of a concerted action, the traditional process has no similar effect on the capacity of the defendant firms to spread litigation costs and prepare the common questions efficiently for a once-and-for-all basis.

David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 Ind.L.J. 561, 563-64, 570-71 (1987). This principle holds in cases where common questions of liability predominate over individual issues of damages. *Streich*, 399 N.W.2d at 218; *Rathbun*, 219 N.W.2d at 652.

Plaintiff's attorneys may argue that a class action is often not merely a superior alternative; but the *only* practical way to adjudicate a controversy. For most members of a class, the litigation costs alone may equal or exceed any potential recovery if they were to pursue their claims on an individual basis. In view of this situation, most of the class members would effectively be denied their day in court if it were left to each individual to bring a separate action. The court in *Sollenbarger* put the issue succinctly:

> The court concludes that a class action is a fair and efficient method for resolving plaintiffs' claims. Plaintiffs have small claims that they could not effectively litigate on an individual basis. Without the class action procedure, plaintiffs would have no remedy … The efficacy of resolving all plaintiffs' claims in a single proceeding is beyond discussion.

Sollenbarger v. Mountain States Tel. & Tel. Co., 121 F.R.D. 417, 436 (D.N.M. 1988).

A class action may be the superior means of resolving a dispute when the alternative "is a series of state court actions by a large number of scattered plaintiffs," resulting in "an inefficient allocation of judicial and public resources." *Lake v. First Nationwide Bank*, 156 F.R.D. 615, 626 (E.D. Pa. 1994). The prohibitive cost of individual litigation is likely to deter most class members from bringing their claims. Expert fees in a case can easily exceed the amount of most of the individual claims, as can the number of attorneys whose fees will require payment.

In addition, individual litigation may present the potential for inconsistent or contradictory judgments. In contrast to the problems associated with individual litigation, plaintiff's attorneys argue that a class action will not only provide class members with a realistic means to redress the defendant's wrongdoing, but it will also conserve judicial resources by efficiently resolving the controversy in one consolidated setting. If the defendant is to prevail, it should be on the merits, and not because the individual class members lack the financial resources to pursue their claims.

However, defense attorneys emphasize that class certification remains inappropriate where individual causation issues would be "an intensely factual inquiry [that] [could] only be done on a day-by-day, event-by-event basis (and probably only for one individual claimant at a time)." *Green v. City of Coon Rapids*, 485 N.W.2d 712, 714 (Minn. Ct. App. 1992). Indeed, the "detailed factual inquiry including physical examination of each [product or its components] [may be] a mind-boggling concept that is preclusively costly in both time and money." *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 449 (E.D. Pa. 2000). This may effectively defeat the plaintiff attorneys' argument that time and resources are conserved when several similar product liability claims are brought as a class.

Minnesota's Acceptance of Multi-State Classes

"Though state courts are divided on the issue whether a state court has power to certify and bind a multi-state or national class, prevailing federal and state precedents [also] support such state court power." Herbert Newberg & Alba Conte, Newberg on Class Actions (3d ed. 2001), at ¶ 13.25. This rule has been followed by Minnesota courts in its certification of class actions. *Heller v. Schwan's Sales Enterprises, Inc.*, 548 N.W. 287, 289-90 (Minn. Ct. App. 1996) ("A state district court may exercise jurisdiction over a multi-state class"); *Grahm v. Knutson Mortgage Corporation*, 1996 W.L. 407, 491, Ct. File No. CT94-11043 (Henn. Cty. Dist. Ct. 1996) ("Thus, the manageability of applying the laws of 50 states does not weigh against certifying a class action").

Therefore, where the product was distributed almost exclusively from Minnesota, an overwhelming majority of consumers impacted are from Minnesota, and no other class action in any state is pending, the court may conclude that Minnesota law will apply to all claims. Indeed, choice of law does not remain an obstacle to certification. As stated in Newberg on Class Actions, a denial of class certification based on the potential application of multiple state laws is the minority approach to class certification, and many courts decline to decide choice of law issues in connection with a motion for class certification:

> The fact that there may be some conflicts of laws issues does not foreclose the certification of a nationwide class, as long as, under *Shutts*, there is a showing that there are "sufficient contacts between the forum state and each individual class member's claims to create forum interests in the litigation such that the application of forum law will not be arbitrary or unfair." Indeed, the denial of class certification on this basis "appears to be the minority approach," and many courts decline "to decide choice of law issues incident to a motion for class certification." If the trial court finds that the forum state has significant contact to the claims asserted by each class member, the court can apply the substantive law of the forum state to nonresident class members.

Newberg on Class Actions § 13.29 (2001 Supp.) (citations omitted).

St. Jude Evidences a Recent Trend Towards Accepting Product Liability Class Actions

In March 2003, Judge John R. Tunheim of the District of Minnesota certified a products liability class action involving an alleged defective prosthetic heart value. In the case, St. Jude unsuccessfully argued against certification based on disparate individual circumstances concerning the implantation of the prosthetic heart valve and the damages. St. Jude also unsuccessfully argued that choice of law issues would swamp the court. Finally, St. Jude disputed the availability of Minnesota's consumer protection statutes to out-of-state residents.

Based upon controlling law, Judge Tunheim certified a nationwide products/consumer fraud class. The Court held that commonality was satisfied, at the least, by the defective chemical coating:

> St. Jude contends that any claim of commonality in this case is "blurred by a host of individual queries." Plaintiffs respond that there is at least one significant question that links all the class members' claims – whether a defect caused by adding Silzone coating to the St. Jude heart valves caused risks or certain injuries. While St. Jude is correct that there may be individual variations in the factual circumstances of some class members, that is not enough to defeat commonality. The Court finds that the question of the Silzone valve's alleged defect is common to all members of both classes…. *Id*. at 6.

Judge Tunheim rejected St. Jude's arguments that individual circumstances precluded certification. He held that common questions and issues revolved around the manufacturer's product and conduct:

> Like the defendant in [*Haley v. Medtronic, Inc*., 169 F.R.D. 643 (C.D. Cal. 1996)], St. Jude focuses on the fact that individual questions for each plaintiff will be critical because each patient has unique medical circumstances causing him or her to react differently to the Silzone valve. Like the court in *Haley*, this Court rejects St. Jude's arguments because it ignores the fact that plaintiffs' claims actually focus on St. Jude's liability and St. Jude's conduct with regard to the Silzone valves – not on their effect on the plaintiffs. *Id*. at 11.

Additionally, and providing further support for Plaintiffs' position in this case, the Court held that Minnesota's consumer protection statutes can be utilized by out-of-state claimants in products cases:

> St. Jude argues that Minnesota law should not presumptively apply to all class members, and that even if it did, plaintiffs must demonstrate individual reliance in each case. These two factors, St. Jude contends, would overwhelm any common issues and make a class action unmanageable. First, St. Jude argues that plaintiffs cannot presume that Minnesota law applies to all class members, who are citizens of various states…. The District of Minnesota addressed this precise question in the *Lutheran Brotherhood* case. In that case, plaintiffs sought certification under Rule 23(b)(3) for alleged violations of a provision of Minnesota's consumer protection statute. The court rejected the contention that there were any impediments to applying Minnesota's consumer protection statutes to a nationwide class, noting that these statutes explicitly permit "any person" injured by violations of the statutes to bring suit.
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> This holding is foursquare with the present case. Plaintiffs' claims under provisions of Minnesota's consumer protection statute, Minn. Stat. § 325F.67 and 325F.69, find support in another provision of Minnesota law that permits "any person" injured by a violation of these statutes to bring suit. Minn. Stat. § 8.31, subd. 3a. As the Minnesota Supreme Court held in *Group Health Plan, Inc. v. Philip Morris, Inc*., 621 N.W.2d 2 (Minn. 2001), none of these statutes contain any language restricting who may sue for violation of the consumer protection laws…. In the present case, it is clear that plaintiffs meet these definitions of "any person" or "a person," and may therefore bring suit under Minnesota law. The fact that individual plaintiffs hail from other states is immaterial… Minnesota law may therefore apply to the classes' consumer protection and deceptive trade practices allegations. *Id*. at 36-37.

Finally, the Court also analyzed and rejected the "individual reliance" arguments advanced by the Defendants:

> St. Jude argues that even if Minnesota law does apply, common questions will not predominate because each individual plaintiff must prove reliance under Minnesota's consumer protection statute. This proposition directly conflicts with Minnesota law. It is by now well established that plaintiffs need not establish reliance when seeking injunctive relief under Minnesota's consumer fraud and deceptive trade practices. More recently, the Minnesota Supreme Court broadened the scope of statutory claims under these statutes in *Group Health,* holding that a plaintiff need not plead individual consumer reliance on a defendant's wrongful conduct to state a claim for damages. Rather, plaintiffs seeking damages need only establish a "causal nexus between their damages and the defendant's wrongful conduct." *Id*. at 39.

Conclusion

The modern interpretation of Rule 23 generally inhibits plaintiffs from achieving class certification. Many courts also remain reluctant to certify due to the perceived predominance of individual issues over those shared by the class. However, recent Minnesota decisions suggest

an increasing amenability to class certification for product liability claims. In cases involving a single product or component that causes injury to hundreds or thousands of individuals, Minnesota courts now often view class actions as a more efficient means for the treatment of several similar claims. Therefore, while plaintiffs must still demonstrate the prerequisites for class certification under Rule 23, the obstacles they once encountered in their pursuit of certification may no longer be as difficult to conquer.

. . .

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