THE CASE FOR SUBROGATED INSURERS TO PARTICIPATE IN CLASS ACTION LITIGATION

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I.
INTRODUCTION

A local fire department is called to control the spread of a relatively small 17 acre rural forest fire. Before the fire is controlled, it spreads onto State-owned lands and State forest fire fighters are called to the scene of the fire to assume control of its extinguishment. The command and control unit officers assigned to make tactical decisions decide to "burn-out" the fire to control its spread. However, before the fire is controlled, embers from the fire shoot out over the fire lines causing areas of land to catch fire that have not been protected. As a consequence, the fire escapes the fire department's control and begins to burn down over 15,000 thousand acres of land. In its path, over 500 structures are burned down. The owners of the damaged property turn to their insurers for over $30,000,000 in reimbursement and suffer nearly $20,000,000 in uninsured losses.

A brand of orthopedic bone screws used in spinal fusion surgery is determined to be defective. Thousands of individuals with implanted bone screws make claims to their health insurers for the costs associated With remediating their health concerns associated with the defective bone screw. insurance claims are estimated in the millions.

An ignition switch used in vehicles is determined to be defective in that it creates a propensity in the ignition switch to spontaneously catch fire. It is discovered that the ignition switch was used by a vehicle manufacturer for numerous models over a seven year period. Vehicle owners make claims on their insurance policies for damages associated with fires caused by the faulty ignition switch. Insurance payments are estimated at over $15,000,000.

These are the type of claims that produce class action litigation. Generally, most individuals do not equate insurance companies as plaintiffs in such lawsuits. Moreover, most plaintiff class action attorneys fail to include subrogated insurers in class action litigation. What must be understood, however, is that insurers' interests in recovery are generally being litigated by proxy through class actions; and, if they fail to participate in the class, insurers, in effect, have waived their rights to significant recoveries.

This paper will provide an overview of how an insurer may intervene in damages class action litigation. Before providing such an analysis, however, this paper will begin with a general overview of the procedures involved in class action litigation.

A. A Basic Outline of Class Action Litigation

1. Certification

After a class action lawsuit is filed, numerous months are spent by class counsel and defense counsel in a process generally called certification discovery. Such discovery is necessary so that the court may rule on whether the lawsuit will continue as a class action; in other words, whether the court will certify the class. This is by far the most important part of a class action lawsuit from the viewpoint of either the defense or plaintiff's counsel.

Federal Rule of Civil Procedure 23[1] (*Rule 23) controls whether a putative class action will be certified. Rule 23 is broken down into two subdivisions. A putative class action complaint must satisfy all of the requirements of subdivision (a) of the Rule and must qualify under one[2] of the three categories contained in subdivision (b).

Rule 23(a) states that one or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Subdivision (a) (1) of the Rule is generally deemed the numerosity requirement. Although couched in terms of numerosity, subdivision (a)(1) is truly focused on whether it would be impracticable, from an efficiency standpoint, to join all individuals who are affected by the allegations in the complaint. See Smith v. Baltimore & Ohio R.R., 473 F. Supp. 572 (D Md. 1979); Daigle v. Shell Oil Co, 133 F.R.D. 600 (D Colo 1990). Furthermore, the named plaintiffs need not allege the exact number or identity of all of the class members. See In re Joint E & S Dist. Asbestos Litig., 129 B.R. 710 (SDNY 1991); Andre H ex rel Lula H v. Ambach, 104 F.R.D. 606 (SDNY 1985).

The second factor of subdivision (a), common questions of law or fact, is met where the named plaintiff can establish that there is at least a single issue of fact or law common to all members of the class. See Jordan v. County of Los Angeles, 669 F.2d 1311 (9th Cir. 1982); Johnson v. Am. Credit Co., 581 F.2d 526 (5th Cir. 1978).

The first two elements of a class action, joinder impracticability and common questions, focus on characteristics of the class itself. The final two elements of Rule 23(a) focus on the desired characteristics of the actual plaintiffs named in the putative class action. The court will generally appoint these parties as representatives of the class; and consequently, they will prosecute the class action on behalf of all members in the class. As such, these parties and their

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[1] The great majority of states follow a rule for class action litigation that is nearly identical to Federal Rule 23.

[2] This paper will focus exclusively on Rule 23(b)(3) class actions. Typically, this is the subdivision under which class action lawsuits for damages are brought under.

attorneys have a fiduciary responsibility to all unnamed plaintiffs. See Manual for Complex Litigation (Third) at 211-12 (Federal Judicial Center 1995).

Subdivision (a) (3) focuses of whether there exists a relationship between the named plaintiffs' claim and the claims alleged on behalf of the class. See General Tel. Co. v. Falcon, 457 U.S. 147 (1982). Generally, a court must ask whether the named plaintiffs are squarely aligned in interest with the group they intend to represent. See Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, 81 Harv. L. Rev. 356, 387 (1967). This element of the Rule will not be met, for example, where the cause of action asserted in the complaint is predicated on individual contracts and differences exist among the relevant provisions. See Graham v. Security Sav. & Loan, 125 F.R.D. 687 (ND III 1989).

Finally, subdivision (a)(4) of Rule 23 requires that two elements be met: (1) absence of conflict between the named class members and unnamed members and (2) assurance of vigorous prosecution by the plaintiffs' attorneys and the plaintiffs themselves. See Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507 (9th Cir 1978); In re Energy Sys. Equip. Leasing Sec. Litig., 642 F. Supp. 718,(EDNY 1986). Virtually all decisions applying this test look at the circumstances of the named plaintiffs individually to determine whether they have any conflicts with the unnamed class members. Furthermore, only those material conflicts pertaining to the issues common to the class action allegations will bar a class action; other conflicts, not relating to the common class issues, will normally not bar the plaintiff from serving as an adequate representative of the class. See Horton v. Goose Creek Indep. School Dist., 690 F.2d 470 (5th Cir 1982); Goldwater v. Alston & Bird, 116 F.R.D. 342 (SD III 1987).

In addition to meeting the above discussed elements of subdivision (a) of Rule 23, a plaintiff must also meet the requirements of subdivision (b). Subdivision (b)(3) requires the court to find that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate action; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of he class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3).

The first mentioned factor, individual control of litigation, focuses on whether individual litigants have a strong interest in prosecuting individual suits, as opposed to joining the class action. For example, in Hobbs v. Northeast Airlines, 50 F.R.D. 75 (ED Pa 1970), an action brought on behalf of persons injured and survivors of person killed in an airline crash, the court denied class certification on the basis that class members had an overriding interest in litigating their own claims individually. Among the factors generally inferred to support individual litigation in such a case are a high degree of emotional involvement, extremely large damage claims, and a desire to tailor trial tactics to individual needs. Id. at 79.

The second listed factor of subdivision (b)(3), other litigation, only comes into play where other similar litigation is on the verge of settlement and a potential class action may prejudice the settlement. See Ciarlante v. CSX Corp., 629 F. Supp. 534 (WD Pa 1986). Generally, if multiple federal suits regarding the same issue are litigated at once, the proper procedural course of action is to transfer and consolidate the proceedings under 28 U.S.C. 1404. This is usually indicative of the need of a class action lawsuit and will lead to the certification of the consolidated suits as a class action. See In re Folding Carton Antitrust Litig., 75 F.R.D. 727 (ED III 1977); In re Plywood Antitrust Litig., 76 F.R.D. 570 (ED La 1976).

The third listed factor contained in Rule 23(b)(3) is the desirability of concentrating litigation in a particular forum. This element is of historical importance and is generally not emphasized in current class action litigation. However, the element is relevant when other class litigation has already been commenced elsewhere. In such situations, defense counsel will argue that the instant class litigation should be transferred or consolidated with other class litigation that is already in progress. See Philadelphia v. Emhart Corp., 317 F. Supp. 1320 (ED Pa 1970); In re Master Key Antitrust Litig., 320 F. Supp. 1404 (JPML 1971).

Finally, the manageability criteria of Rule 23(b)(3) has been the most hotly contested factor and the most frequent basis used to rule that a class action is not the most superior method of adjudicating claims. There is no general rule used by courts in evaluating this criteria. It is truly a factually based analysis. Although there is a facially logical appeal in claiming that this criteria argues against certifying class actions that are too complex, courts have consistently ruled against such arguments.

For example, many courts have recognized that complexity is often a characteristic of class action litigation and that potential management difficulties are not grounds for class denial when justice can be done only through the class action device:

> Although there may be difficulties encountered in managing this antitrust suit as a class action, . . ., the difficulties likely to be encountered in the management of a class action are not important when weighed against the benefits to the class, and any subclasses thereof, and to the administration of justice.

Research Corp. v. Pfister Assoc. Growers, Inc., 301 F. Supp. 497 (ND III 1969).

Indeed, the manageability criteria is not a bar to class litigation where the benefits of economy of time, efficiency and fairness can be effectively obtained through a class action, and without a class action many potential members will be forced to forgo their class claims because of high litigation costs. See Grace v. Rosenstock, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,541 (EDNY 1986). As such, courts go to great lengths in certifying a class. For example, courts have the authority to separate the class in several subclasses with distinct issues in each subclass or rule that a class action will only be maintained for liability purposes and require litigants to prove their damages separately before an arbitrator or special master. See Davenport v. Gerber Products Co., 125 F.R.D. 116, 119-20 (EDPal989). However, where individual issues of class members so predominate over class issues, certification of a class will generally be denied. See Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 608 (SDNY 1982).

B. Post Certification Issues

Once a court agrees that a class should be certified two general areas of concern are dealt with by the court: (a) notice to unnamed class members and (b) a right for such class members to opt-out of the litigation.

Both issues are related to one another. Notice is the means by which unnamed class members are informed of their rights in the litigation. The burden to provide notice to such individuals is now routinely delegated to the plaintiff's counsel. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 179 (1974). It is also settled that the plaintiffs must bear the initial expense associated with notice of class certification under Rule 23(c) (2), and the plaintiffs must also bear the expense involved in identifying class members entitled to receive notice. See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978).

Finally, the notice must provide a time period during which class members have the opportunity to opt-out of the litigation. This is the only period of time during which an individual whose interest is encompassed by the class litigation has the opportunity to either not pursue recovery through the class litigation and initiate suit on her own or forgo recovery. Prior to this period of time, the interested party's rights are bundled in the class litigation with the rights of other unnamed members of the class.

It has been our experience that subrogated insurers are not provided such notice. Given that, insurers have two methods by which to recover subrogated funds. First, intervene in the class action litigation. Second, file separate suits in their own names. We believe that intervention in class litigation will prove to be the more economical and politically appropriate method to recover subrogated funds.

II.
Intervention in Class Action Litigation

In one of three reported cases that we have found on the subject of insurers involvement as potential plaintiffs in class litigation, a district court judge for the United States District Court for the Eastern District of Louisiana stated what we believe will be the general mind-set of courts with regard to insurers intervening in damage class action lawsuits. In In re Shell Oil Refinery, 1989 WL 48425, several unnamed insurers attempted to opt-out of a 23(b)(3) damage class action lawsuit brought by individuals and entities injured by an oil refinery explosion. The class action notice contained the following definition of the class:

> All persons or entities who were physically present or owned property ... on May 5, 1998 and who sustained injuries or damages as a result of the explosion to the Shell Oil Refinery at Norco, Louisiana.

Id. This definition controlled the subject of who could be members of the class. In denying the insurers the right to opt-out, the court held that the definition of the class did not include the insurers' interests.

Although stating that the insurance companies stood in the shoes of their insureds only to the extent that they had paid property damage claims, the court still held that:

> They are not subrogated to claims or personal injuries or other types of claims not covered by the property damage payments. Thus, the insurance companies are only partially subrogated. Under the terms of the notice of class action, they cannot have filed a partial opt-out.

Id. The district court's holding not only failed to appreciate the underpinnings of class action litigation, but also failed to appreciate the well-known doctrine of subrogation. Furthermore, by failing to permit the insurers to assert their subrogated rights, the Shell court permitted plaintiffs' counsel to pursue the subrogated interests of the insurers without the insurers' cooperation, input or coordination. In other words, the named class members and their counsel were permitted to reap the benefits of a double recovery (uninsured and insured losses) and force the insurers to recover their subrogated interests through litigation with each and every one of their insureds at the end of the class litigation. By doing this, the court denied the insurers' due process rights, as well as failed to understand the general nature of class action litigation.

The Shell Oil Refinery decision highlights two general issues that courts and insurers must be aware of in fact situations where insurers may have subrogated recovery rights in class action lawsuits. These areas are: (a) the impracticality and lack of judicial economy in refusing to permit insurers to intervene in class action lawsuits, and (b) the due process concerns in denying insurers' motions to intervene in class actions. Prior to discussing these issues, a brief overview of the procedural rule permitting intervention, Rule 24, is necessary.

Rule 24 permits intervention by two methods. 24(a)(2) permits intervention "of right" when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Rule 24(b) permits permissive intervention when an applicant's claim or defense in the main action have a question of law or fact in common.

Our research indicates that in only one instance has an insurer attempted to use Rule 24 as a means to participate in a damage class action lawsuit. See In re Silicone Gel Press Implant Product Liability Litigation (MDL 926), District Court Master File No. CV92-P-10,000-S, Case No. CV-94-P-11558-S. In that case, Travelers Insurance Company attempted to intervene at the time of settlement of this lawsuit arguing that the settlement would impair and impede its ability to protect its interest. The district court, however, rejected Traveler's argument and denied its motion. Traveler's, as well as other insurers, then filed an appeal with the Eleventh Circuit on similar issues. We are unaware at this time of the resolution of that appeal.

A. The Practical Need for Insurers to Intervene at Early Stages of Class Action Litigation

Parties have several opportunities to intervene in class action lawsuits. Generally, parties wait to intervene in class actions until the time the settlement agreement has been approved or at

the time a fairness hearing is scheduled for the settlement agreement as Traveler's attempted. For most plaintiffs, such a strategy is appropriate. However, because of the legal issues involved in subrogated insurers' rights to recovery, such a strategy is inappropriate for insurers.

An adequate example of the inefficiencies involved with insurers attempting to intervene at the time of settlement and/or object to class action settlements is exemplified by the In Re Orthopedic Bone screw Product Liability Litigation, 176 F.R.D. 158 (ED Pa 1997). In that case, approximately 65 health insurers objected to the settlement between the class and the defendants, arguing that the class did not protect the health insurers' subrogated interests in getting reimbursed for medical expenses they paid to bone screw patients. The court denied such objections. The insurers were then forced to appeal to the Third Circuit. The plaintiffs' legal committee initially opposed the appeal.

Prior to having the Third Circuit rule on the appeal, the parties came to an agreement in which the plaintiffs' legal committee would supply the insurers with registration forms of all claimants in the class. Within 120 days of receiving such names, the insurers were obligated to provide the claims administrator for the class litigation the name of claimants against whom the insurers would assert subrogation claims. The claims administrator would then proceed to rule on the appropriateness of the claim and determine the percentage that the insurer would receive from its insured's recovery.

The effect of this subrogation settlement agreement in essence places the subrogated insurers in opposition to and in conflict with their insureds. Specifically, by making a claim for subrogated amounts against the plaintiffs' settlement pool, the subrogated insurers claimed an equitable trust fund right against each and every one of their insureds who collected some funds from the settlement. See e.g., State Farm Mutual Auto Insurance Company v. Elkins, 451 S.W.2d 528 (1970); Maldonado v. Haney, 610 P.2d 222 (1980). As such, insureds would see the insurers participation in this manner as directly diluting their recovery.

Subrogated insurers could avoid this conflict between their interests and their insureds by two means. First, an insurer or multiple insurers could join the class action lawsuit as named party representatives on behalf of all insurers. By this step, insurers could separate their financial interests from their insureds at the start of the litigation. This would also benefit the class members in assisting with notice and litigation expenses. Moreover, it may also be seen as a positive public relations goal. Second, all affected insurers could file complaints in intervention alleging individual claims for relief against the defendants for subrogated amounts within the class litigation.

B. Due Process Concerns Require Subrogated Insurers to Intervene

Class actions are representative lawsuits. As stated by the United States Supreme Court in Hansberry v. Lee, 311 U.S. 32 (1940):

> Members of a class not present as parties to the litigation may be bound by the judgment when they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties.... In all such cases so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented though absent, which would satisfy the requirements of due process....

Id. at 42, 43.

As noted by the Hansberry court, due process protections are emphasized in class action lawsuits as a consequence of their representative nature. The Supreme Court clarified the due process concerns discussed in Hansberry in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1984) by enumerating four due process concerns in class action litigation. These are: (1) notice, (2) an opportunity to be heard and participate in litigation, (3) an opportunity to remove oneself from the class by opting out, and (4) adequate representation at all times.

Id. at 812.

Another reason exists as to why insurers should participate in class litigation: knowledgeable defense counsel. Specifically, defense counsel often exploit the fact that a class action recovery was received and that now, only after the recovery, subrogated insurers are attempting to collect reimbursement from the defendant in a separate lawsuit. Defense counsel will argue that the appropriate course of action would be to recover subrogated sums from the insurers' insureds who obtained compensation through the class action. Indeed, the equitable trust fund doctrine was established for just such situations. If a second award is provided, defense counsel will argue, the defendant will in essence have to pay twice for the same wrong.

Consequently, such factors should strongly motivate insurers to participate in class litigation. Finally, subrogated insurers should be active members in class action lawsuits involving their interests. If insurers choose not to participate in such lawsuits, from a practical standpoint they will have chosen to waive their rights to recovery.