

The Class Action:

A device for correcting small injustices on a grand scale

By Ryan E. Hodge

In a large and impersonal society, class actions are often the last barricade of consumer protection. To consumerists, the consumer class action is an inviting procedural device to cope with lawsuits causing small damages to large groups. The slight loss to the individual, when aggregated in the coffers of the wrongdoer, results in gains which are both handsome and tempting. The consumer class action, when brought by those who have no other avenue of legal redress, provides restitution to the injured and deters the wrongdoer. *Eshaghi v. Hanley Dawson Cadillac Co.*, 574 N.E.2d 764, 766 (1991). Notwithstanding the fact that class actions are a powerful tool in litigation, they are rarely used. The purpose of this article is to provide a basic understanding of class action law noting Kansas law where applicable. The Kansas rules for class actions are found at K.S.A. 60-223 and are substantially similar to their federal counterpart, F.R.C.P. 23. Because of their

Although rarely used in
Kansas, the class action is an
effective device to redress
small wrongs for
hundreds of consumers.

similarity, it is appropriate to rely heavily on federal decisions regarding class actions. *Beaver v. Chaffee*, 2 Kan. App. 2d 364, 371, 579 P.2d 1217 (1978); *Steele v. Security Benefit Life Ins. Co.*, 226 Kan. 631 (1979).

The Purpose of a Class Action

When filing a class action it is important to understand the purposes of a class action because its purposes will be considered by the courts when determining whether a class should be certified. *Weaders v. Peters Realty Corp.*, 499 F.2d 1197 (6th Cir. 1974).

The policies and purposes of class action litigation include (a) achieving judicial economics and preventing a multiplicity of suits, *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 340 (10th Cir. 1975); (b) deterring multiple wrongs and fraud, *Illinois v. Harper and Row Publishers, Inc.*, 301 F. Supp. 484, 493 (N.D. Ill. 1969); (c) fulfilling legislative policy in the area of consumer fraud, *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1165-1166 (7th Cir. 1974); and (d) providing a forum for small claimants and the uninformed, *American Pipe and Construction Co. v.*

Utah, 414 U.S. 538, 551-552 (1974).

Rule 60-223

The requirements for certification of a class are found in K.S.A. 60-223 and are as follows.

■ (a) Prerequisites to a class action.

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.

In addition to the above four prerequisites the class must meet one of the following three requirements:

■ (b) Class actions maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition if:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of 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 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 parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has



Ryan E. Hodge is a managing partner at the firm of Ray Hodge & Associates, Wichita. He has been in practice since 1994, practicing in the areas of criminal, domestic, bankruptcy, and civil litigation.

His current emphasis is on personal injury litigation. Ryan is a graduate of the University of Kansas School of Law and obtained a M.B.A. from Eastern College in Philadelphia, PA, and a B.B.A. from Baylor University in Texas. Hodge is a member of the KTLA Board of Governors and the CLE committee.

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) 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: the interest of members of the class in prosecuting or defending separate actions; the extent and nature of any litigation concerning the controversy already begun by or against members of the class; and the appropriate place for maintaining, and the procedural measures which may be needed in conducting, a class action.

Meeting the Tests

■ **Numerosity.** In order to meet the numerosity prerequisite (K.S.A. 60-223(a)(1)) counsel must present some evidence or otherwise establish by reasonable estimate the number of class members who may be involved. *Rex v. Owens*, 585 F.2d 432, 436 (10th Cir. 1978).

A class is sufficiently numerous if joinder of all class members is impracticable, *Aguinaga v. John Morrell & Co.*, 602 F. Supp 1270, 1278 (D. Kan 1985). When the class is large, numbers alone should be dispositive, and a class with as few as 40 members should generally be assumed to meet the impracticability of joinder requirement and raise a presumption that joinder is impracticable. *General Telephone Co. v. EEOC*, 446 U.S. 318 (1980).

■ **Commonality.** The prerequisite of K.S.A. 60-223(a)(2) requires that there be a question of law or fact common to the class. Not all questions of law or fact raised in the litigation need be common. *Like v. Carter*, 448 F.2d 798 (8th Cir. 1971), *cert. denied*, 405 U.S. 1045 (1972). In fact, a single common question or fact will suffice. *In re Asbestos Litigation*, 104 F.R.D. 422 (E.D. Pa. 1984), *aff'd in part, vacated in part on other grounds*, 789 F.2d 996 (3rd Cir.) *cert. denied*, 479 U.S. 852 (1986).

■ **Typicality.** The third requirement for class certification is typicality. K.S.A. 60-223(a)(3) requires that the claims or defenses of the representative parties are typical of the claims or defenses of the class. The purpose of the typicality requirement is to insure that the interests of the absent class members will be protected. *General Telephone Co. v. Falcon*, 457 U.S. 147, 157 n. 13 (1982). Kansas courts refer to the typicality requirement as the coextensiveness requirement. *Helmley v. Ashland Oil, Inc.*, 1 Kan. App. 2d 532, 535 (1977).

The coextensiveness requirement does not mandate that the position of the class representative be identical to the class. It only requires that the class members share common objectives and legal or factual positions. *Helmley v. Ashland Oil, Inc.*, 1 Kan. App. 2d 532, 535 (1977); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 Sup. Ct. 2140, (1974).

■ Adequacy of Representation.

K.S.A. 60-223(a)(4) requires that the representative parties fairly and adequately protect the interests of the class. In Kansas, six factors are used to determine the adequacy of representation. In *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 207 (1984), the Supreme Court set forth the factors as follows:

(1) Whether there is adequate competent counsel; (2) whether the litigants are involved in a collusive suit; (3) whether the interests of the named parties are conflicting with or are antagonistic in any way to the interests of the other members of the class; (4) whether the named representatives' interests are coextensive with the interests of the other members of the class; (5) the quality of the named representatives, not the quantity; and (6) the extent of the named representatives' interests in the suit's outcome.

The first factor identified in *Shutts* is competency of counsel. Competency is presumed at the outset of the litigation in the absence of specific proof to the contrary, *Aguinaga v. John Morell & Co.*, 602 F. Supp 1270 (D. Kan 1985); *Dolgow v. Anderson*, 43 F.R.D. 472, 496 (E.D.N.Y. 1968). Furthermore, the general rule is that potential recovery of large sums of money is an acceptable motive that will encourage vigorous prosecution by counsel. *Dorfman v. First Boston Corp.*,

62 F.R.D. 466 (E.D. Pa. 1973).

The second factor to be considered is whether the litigants are involved in a collusive suit. In other words, are the class representatives acting in collusion for some ulterior motive?

The third factor is absence of conflict between the representatives of the class and the class members. For a conflict to disqualify a named plaintiff, the conflict must address specific fundamental issues in the controversy. *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 207-208 (1984). Conflict situations that do not pertain to the common issues directly do not pose a bar to adequate representation. *Simmons v. City of Kansas City*, 129 F.R.D. 178 (Dist. Kan. 1989).

The fourth factor is whether the named representatives' interests are coextensive with the interests of the other members of the class. As has been stated previously, according to *Helmley*, this requirement is the same as the typicality. *Helmley* at 535

The fifth and sixth factors deal with the quality of the representative and the assurance that he will vigorously prosecute the claims of the class. When determining whether a named plaintiff will be an adequate representative of the class, it is to be noted that the law does not require that a named plaintiff be the perfect class member, or even the best available. *Helmley v. Ashland Oil, Inc.*, 1 Kan. App. 2d 532, 537 (1977). For a plaintiff to be an adequate representative, he must vigorously prosecute the interests of the class. *Senter v. General Motors*, 532 F.2d 511, 524-25 (6th Cir.) *cert. denied*, 429 U.S. 870 (1976).

The legal standard to determine whether the named plaintiff will adequately represent the class is whether he has expressed an interest in the proceedings, *In re United Energy Corp.*, 122 F.R.D. 251, 258 (C.D. Calif. 1988); *Wolfson v. Riley*, 94 F.R.D. 243 (N.D. Ohio 1981), or whether the named plaintiff has sufficient knowledge and interest to assist his counsel in the preparation and presentation of the case. *Bowen v. General Motors Corp.*, 542 F. Supp. 94, 99 (N. D. Ohio) citing *Sonnier v. Engineers and Fabricating*, 29 F.R. Serv.2d 1020 (S.D. Tex 1980).

■ **The "b" Tests.** In addition to

meeting all the requirements of K.S.A. 60-223(a), the plaintiff must fulfill at least one of the three conditions in K.S.A. 60-223(b).

K.S.A. 60-223(b)(1) requirements. The requirements for class certification under K.S.A. 60-223(b)(1) are in the disjunctive and are met if either of the following two tests are met: (1) The prosecution of separate actions by or against individual members of the class would create a risk of 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) The prosecution of separate actions by or against individual members of the class would create a risk of 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 parties to the adjudications or substantially impair or impede their ability to protect their interests.

The likelihood of other cases being filed on the issues alleged in the plaintiff's petition is sufficient reason to certify a(b)(1) class. *In re Federal Skywalk Cases*, 93 F.R.D. 415, (W.D. Mo.) *rev'd.*, 680 F.2d 1175, (8th Cir.) *cert. denied*, 459 U.S. 988 (1982).

K.S.A. 60-223(b)(2) certification. K.S.A. 60-223(b)(2) allows a class action to be maintained when the K.S.A. 60-223(a) prerequisites have been met and 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. Certification of a suit seeking declaratory or injunctive relief is the type of action generally contemplated under (b)(2). *Probe v. State Teacher's Retirement System*, 780 F.2d 776, 780 (9th Cir. 1986). However, monetary relief has been granted on a classwide basis in Fed. R. Civ. Proc. 23(b)(2) actions. See, *example Parker v. Local Union No. 1466 United Steel Workers of America*, 642 F.2d 104 (5th Cir. 1981).

K.S.A. 60-223(b)(3) certification. K.S.A. 60-223(b)(3) permits an action to be maintained as a class if two requirements are met. The first criterion is that questions of law or fact common to the class predominate over questions of individual members. The second is that the class action device be superior to other methods of adjudicating the particular claim.

Common questions predominate if there is a "common nucleus of operative facts" relevant to the dispute. *Esplin v. Hirsche*, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969). The predominance test has also been characterized as a common challenge test. *Smith v. MCI Telecommunications Corp.*, 124 F.R.D. 665 (D. Kan. 1989).

The second requirement under K.S.A. 60-223(b)(3) is that the class action mechanism be superior to other available methods of adjudicating the controversy. Matters pertinent to such findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions, (b) the extent and nature of any litigation concerning the controversy by or against members of the class already pending, (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and (d) the difficulties likely to be

"AMFS evaluated my case and provided my experts. I would not have won the case without them."

—MICHAEL E. CARDOZA
San Francisco Trial Attorney



MEDICAL EXPERTS WITH A WIN RATE OF 92%

Our in-house, board-certified MDs review medical records and match experts to meritorious cases from our panel of thousands of carefully pre-screened specialists in your region.

CALL 1-800-275-8903

Visit our web site—www.amfs.com

AMFS
American Medical Forensic Specialists, Inc.

A physician managed company

MUCH MORE THAN JUST A REFERRAL SERVICE—

encountered in the management of a class action.

The first factor to consider to determine the superiority of the class action is whether there is interest by the members of the class in individually controlling the prosecution or defense of separate actions. When considering this issue, the court should also look at the burden upon the defendant in defending numerous separate suits as well as the burden upon the court in entertaining the separate suits. Rules Advisory Committee Notes to 1966 Amendments to Rule 23, 39 F.R.D. 69, 104 (1966).

The second issue is the extent and nature of any litigation concerning the controversy by or against members of the class already pending. A class action is favored when no other litigation exists concerning the controversy. *Dirks v. Clayton Beverage Co.*, 105 F.R.D. 125, (D. MN. 1985).

The third factor is the desirability of concentrating the litigation in a particular forum. The desirability of concentrating claims is relevant only when other class litigation has already been commenced elsewhere. Herbert Newberg, *Newberg on Class Actions*, Sec. 4.31 at p. 4-124-125 (1992).

The final requirement for superiority of a class under rule 23(b)(3) is that the class be manageable. Dismissal for management reasons is never favored. *In re Riter v. Sonotone*, 442 U.S. 330 (1979).

Conclusion

Although rarely used in Kansas, the class action is an effective device to redress small wrongs for hundreds of consumers. ❖