

# **SURVEY OF STATE CLASS ACTION LAW - 2002**

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**A Report of the State Laws Subcommittee of the Class Actions and  
Derivative Suits Committee**

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## UTAH

### DECISIONS INTERPRETING RULE 23 OF THE UTAH RULES OF CIVIL PROCEDURE

#### 1. Comparison with Rule 23 of the Federal Rules of Civil Procedure.

Utah Rule of Civil Procedure 23 is nearly identical to Rule 23 of the Federal Rules of Civil Procedure. The most significant variation from the federal rule is that Utah has not adopted a counterpart to Rule 23(f) of the Federal Rules, which permits interlocutory appellate review of certification decisions. Because the Utah rule is so nearly parallel to the federal rule, decisions rendered under the federal rule are likely to be persuasive in Utah courts. *Cf. Olson v. Salt Lake City School Dist.*, 724 P.2d 960, 965 n.5 (Utah 1986) (noting that, since Utah Rule of Civil Procedure 54(b) is nearly identical to the corresponding federal rule, "we rely heavily on decisions under the federal rule . . ."); *Workman v. Nagle Constr., Inc.*, 802 P.2d 749, 751 (Utah Ct. App. 1990) (comparing court's interpretation of Utah Rule 77(d) with case law under comparable federal rule).

#### 2. Case Law Interpreting Rule 23.

##### a. Rule 23 in general.

The Utah Supreme Court has described the rule permitting the maintenance of class actions as "one of the most far-reaching and important changes in legal procedure in many a decade. Its impact on the enforcement of consumer rights, antitrust claims, securities claims and civil rights actions, to name but a few areas, has been monumental." *Richardson v. Arizona Fuels Corp.*, 614 P.2d 636, 640 (Utah 1980).

Class actions are equitable in nature. *See Plumb v. State*, 809 P.2d 734, 738 (Utah 1990); *Richardson*, 614 P.2d at 640 ("[C]lass actions have historical antecedents in rules of equity that go back several centuries in English Jurisprudence . . ."). The Utah Supreme Court has also noted that class actions "allow[] access to the courts for numerous claimants to request redress of claims that are too small to merit the expenses of litigation on an individual basis," *Call v. City of West Jordan*, 727 P.2d 180, 183 (Utah 1986), and that such actions adjudicate the rights of people who generally "are not actively involved in the litigation or aware of specific actions taken in it." *Workman*, 802 P.2d at 753. These features of class actions require trial courts presiding over class actions to occupy a unique, supervisory role, *see Plumb*, 809 P.2d at

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738, one critical aspect of which involves protecting the class members' interests.<sup>12</sup> *See id.* Because class actions adjudicate the rights of persons without their active participation and impose a higher burden on the court, class actions are justified only if the requirements set forth in Rule 23 are met. *See id.*

The party seeking class certification bears the burden of establishing that certification is warranted. *See Ditty v. Check Rite, Ltd.*, 182 F.R.D. 639, 641 (D. Utah 1998). A group of plaintiffs may not simply proceed as a class without a certification ruling. Instead, the court must make a ruling as to whether the criteria are satisfied. *See Bentley v. West Valley City*, 21 P.3d 210, 211 n.2 (Utah 2001). To determine whether a proposed class action may proceed as such, the trial court must carefully apply the criteria set forth in Rule 23(a) and (b) to the underlying facts of the case. *See Richardson*, 614 P.2d at 639. If Rule 23's requirements are met, the trial court has discretion to determine whether the entire action or individual claims within the action should proceed as a class action. *See id.* Merely asserting that the action qualifies as a class action by reciting or mimicking the language of Rule 23 is insufficient. *See id.* (quoting *Jones v. Diamond*, 519 F.2d 1090, 1098 (5th Cir. 1975)). Attempting to revive dismissed individual claims by amending the complaint to assert a class action is also unlikely to succeed. *See Price v. Bear River Mut. Ins. Co.*, \_\_\_ P.2d \_\_\_, 2002 WL 16105621 (Utah).

**b. Rule 23(a).**

As under the federal rule, a party seeking to institute a class action in Utah may sue or be sued on behalf of a class only if each of the following requirements is met: "(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." UTAH R. CIV. P. 23(a).

**(1) Numerosity.**

The standard governing the required number of class members under Utah's Rule 23 is identical to the standard under the federal rule and inquires whether the size of the class is so large as to make joinder of the members' claims impracticable. *Cf. Ditty*, 182 F.R.D. at 641 ("The first question under [federal] Rule 23 is whether 'the class is so numerous that joinder of all members is impracticable.'"). "To satisfy this requirement, the plaintiffs need not show that joinder of all members of the class is impossible, only that it is impracticable." *Serfaty v. International Automated Sys., Inc.*, 180 F.R.D. 418, 420 (D. Utah 1998). No Utah court has established a minimum number of claimants necessary to form a class, but the Utah Supreme

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<sup>12</sup> The *Workman* court explained that the supervisory role assumed by courts in class actions can be avoided by using a different scheme to organize a group of litigants: "A class action is not the only means of organizing, for litigation purposes, a group of claimants whose interests appear to be aligned or similar. Such a group may form an association, a non-profit corporation, or use another means of organizing private activity. Such private organizational forms have the advantage of leaving in the claimants' hands the decisions concerning their relations between themselves, rather than placing the court in the role of defining and overseeing those relations in supervising a class." *Workman*, 802 P.2d at 753 n.6.

Court has stated that the size of the class alone is not determinative of impracticability of joinder. *Call*, 727 P.2d at 183. In fact, the United States District Court for the District of Utah has explained that it is not necessary for the plaintiffs to "identify the exact number of class members involved; courts have often used common sense assumptions to support a finding of numerosity." *Ditty*, 182 F.R.D. at 641; *Serfaty*, 180 F.R.D. at 420. For example, in the context of a securities action, "where the number of persons who bought stock during the class period is unknown, numerosity can be assumed where the number of shares traded is so great that common sense dictates the class is very large." *Serfaty*, 180 F.R.D. at 420 (quoting *Grace v. Perception Tech. Corp.*, 128 F.R.D. 165, 167 (D. Mass. 1989)). Although the Utah Supreme Court has not expressly adopted the common sense standard, it has tacitly acknowledged its importance, stating that in some cases "sheer size alone" may render joinder impracticable. *See Call*, 727 P.2d at 183. The court also has indicated that joinder may be impracticable where the size and membership of a class is unknown. *See id.*

**(2) Commonality.**

No reported Utah case has discussed the commonality requirement. However, in keeping with general federal law on the subject, the United States District Court for the District of Utah has noted that "[i]n order to demonstrate commonality, the plaintiffs must show that there are questions of law or fact common to the class." *Ditty*, 182 F.R.D. at 639. With respect to common questions of law, the Tenth Circuit has held that simply asserting systematic violations of the law is insufficient; instead, all members of the putative class "must share a discrete legal question of some kind." *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1289 (10th Cir. 1999).

**(3) Typicality.**

"The question of typicality . . . is closely related to the . . . question of commonality." *Ditty*, 182 F.R.D. at 642 (quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)). The federal district court for the District of Utah has held that a plaintiff's claim is typical when it arises from "the same event or practice or course of conduct that gives rise to the claims of other class members and [is] based on the same legal theory." *Id.* (quoting *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 223, 232 (7th Cir. 1983)). Further, where the named plaintiffs' claims are based on the same fact pattern and legal theory, a finding of typicality is favored and "minor factual variations will not defeat the formation of the class." *Id.*

**(4) Fair and Adequate Protection of the Interests of the Class.**

As with the prior two requirements, federal law provides some guidance on representation of the class members' interests. The two most important factors affecting the fair and adequate representation criterion are: "(1) the class attorney's qualifications, experience, and ability to conduct the litigation and (2) whether the named plaintiffs have interests antagonistic to those of the class." *Id.* While conflicts between members of a proposed class may prevent class certification, conflicts that are merely potential or based on speculation are insufficient to defeat certification. *See Serfaty*, 180 F.R.D. at 420. Additionally, the conflict must focus on the central issue of alleged wrongdoing rather than on the amount of damages suffered. *See id.*

a. **Rule 23(b).**

In addition to meeting the each of the four requirements set forth in Rule 23(a), a plaintiff must meet at least one of the three criteria enumerated in Rule 23(b), which are identical to those set forth in the federal rule. No Utah case law has been issued on these criteria.

b. **Rule 23(c)(2).**

Once a court has issued an order as to whether an action may be maintained as a class action, Rule 23(c)(2) requires the court to direct "the best notice practicable" to the class members, including individual notice to all members who can be identified through reasonable effort. UTAH R. CIV. P. 23(c)(2).<sup>13</sup> The court's notice must advise the class members that: (1) the court will exclude the member from the class if the member makes a request to that effect by a specified date; (2) the judgment, whether or not it is favorable to the class, will include all members who do not request exclusion from the class; and (3) members who do not request exclusion may, if they choose to do so, enter an appearance in the action through their counsel. *See id.* The court's duty to notify class members of a pending action is one of the responsibilities placed on the court to safeguard the interests of the absent class members. *See Workman*, 802 P.2d at 753. In fact, "[n]otice to absent members of a plaintiff class, and an opportunity for them to disassociate themselves from the class, are critical requirements for maintenance of a class action, requirements founded in the federally guaranteed right of the absent class members to due process of law." *Id.* In recognition of the notice requirement's importance, the Utah Court of Appeals has held that a judgment entered on behalf of members of a class who have not received proper notice of a class action is void. *See id.*

c. **Rule 23(e).**

The nature of a trial court's supervisory role in class actions is exemplified by the requirement that the trial court must approve any settlement of a class action. *See Plumb*, 809 P.2d at 738; *see also* UTAH R. CIV. P. 23(e). Two specific rationales support the trial court's role as a monitor of the relations between class members and their counsel with respect to settlements. First, in cases where members of the class have not been identified or located, the court must guard the missing members' rights. *See id.* at 739. Second, where class members have only minor interests in the litigation, they also may have only slight motivation to monitor the conduct of counsel and to carefully evaluate proposed settlements. *See id.* Accordingly, the requirement of court approval of settlements and dismissals can help prevent "manipulation and exploitation of the class by its counsel" and assures that the interests of all class members are considered by a neutral party before a settlement is finalized. *See id.* In sum, the "whole

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<sup>13</sup> One important caveat to the notice requirements contained in Rule 23(c)(2) is that they are applicable only to class actions brought under Rule 23(b)(3), not to actions for injunctive relief brought under Rule 23(b)(2). *See Holmgren v. Utah-Idaho Sugar Co.*, 582 P.2d 856, 858 (Utah 1978). Thus, notice by publication may be adequate for purposes of a class action seeking only injunctive relief. *See generally id.*

philosophy" of Rule 23 respecting dismissals and settlements of class actions is to protect class members from potential abuse. *Id.*

### 3. Miscellaneous.

#### a. Distinction Between Class Actions and Derivative Actions.

Derivative actions are governed by Rule 23.1 of the Utah Rules of Civil Procedure. Explaining the distinction between class actions and derivative actions, the Utah Supreme Court has stated that each type of action rests on fundamentally different substantive principles of law. *See Richardson*, 614 P.2d at 638. On the one hand,

[a] class action . . . is predicated on ownership of the claim for relief sued upon in the representative of the class and all other class members in their capacity *as individuals*. Shareholders of the corporation may, of course, have claims for relief directly against their corporation because the corporation itself has violated rights possessed by the shareholders, and a class action would be an appropriate means for enforcing their claims. A recovery in a class action is a recovery which belongs directly to the shareholders.

*Id.* (emphasis in original). On the other hand,

[a] derivative action must necessarily be based on a claim for relief which is owned by the stockholders' corporation. Indeed a prerequisite for filing a derivative action is the failure of the corporation to initiate the action in its own name. The stockholders, as a nominal party, has no right, title, or interest whatsoever in the claim itself whether the action is brought by the corporation or by the stockholder on behalf of the corporation.

*Id.* The court also noted that, if a class action is improperly used in place of a derivative action, "grave injustices" may result, "not the least of which is the diversion of assets recovered in a lawsuit from creditors of a corporation to stockholders, thereby reversing long established substantive rules of law as to the relative priorities of the claims of creditors and stockholders to the assets of an insolvent corporation." *Id.* at 640.

#### b. Awards of Attorneys' Fees in Class Actions.

Awards of attorneys' fees to be collected by a class are subject to the trial court's approval, which in turn is dependent on the trial court's determination that the award is fair and reasonable. *See Plumb*, 809 P.2d at 738. Where a trial court is not satisfied that a sufficiently adversarial relationship exists between the class representatives and class counsel in a dispute involving attorney fees, the Utah Supreme Court recommends that the class hire or the trial court appoint special counsel for the class to act as an adversary in the fee dispute. *See id.* at 743-44.

**c. Class Action Settlement Agreement Does Not Impose Special Duty to Protect Class Members.**

In *Sanders v. Leavitt*, 37 P.3d 1052, 1057 (Utah 2001), the Utah Supreme Court held that the lawyers of a plaintiff class in an action seeking reform of the Utah child-welfare system did not assume a special duty to protect the members of the class from future harm by virtue of a settlement reached in the action. In an action filed against the attorneys of the plaintiff class after the settlement of the class action, a father had sought to hold the attorneys liable for the death of his child, who had been a member of the class, based on the settlement agreement. The court declined to hold the attorneys responsible for the child's physical well-being or medical care.

**d. Aggregation of Punitive Damages and Attorneys' Fees for Purposes of Diversity Jurisdiction.**

In the Tenth Circuit, members of a class may not aggregate either their claims for punitive damages or attorneys' fees for purposes of meeting the amount of claim requirement of diversity jurisdiction. See *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1292-93 (10th Cir. 2001).

**e. Standard of Review of Certification Decisions.**

The standard of review applicable to the grant or denial of certification of a class is abuse of discretion. See *Call*, 727 P.2d at 183; *Valdez*, 186 F.3d at 1287.