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Mandatory Class Actions

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To qualify as a mandatory class, the prerequisites of Rule 23(a) must be satisfied, and additionally, either Rule 23(b)(1) or Rule 23(b)(2) must be satisfied. The following discussion describes the requirements of Rule 23(b)(1) and Rule 23(b)(2).

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Requirements

Q 3.1 What requirements must be met to qualify as a mandatory class?

To qualify as a mandatory class, the prerequisites of Federal Rules of Civil Procedure 23(a) must be satisfied, and additionally, either Rule 23(b)(1) or Rule 23(b)(2) must be satisfied. To gain class certification under Rule 23(b)(1) it must be shown that:

prosecut[ion] of separate actions by or against individual class members would create the risk of: A) inconsistent or varying adjudications with respect to individual members that would establish incompatible standards of conduct for the party opposing the class, or B) adjudications with respect to individual class members would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests.¹

Alternatively, a class can be certified under Rule 23(b)(2) if “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”²

Rule 23(b)(1) and (b)(2) classes are considered “mandatory” because class members are not typically provided with “opt-out” rights,³ unlike Rule 23(b)(3) classes.⁴ Thus, Rule 23(b)(1) and (b)(2) class members subject to the court’s jurisdiction are bound by a settlement or judgment on the class claims. Also, while notice to class members is mandatory in a Rule 23(b)(3) action,⁵ it is only permissive in a Rule 23(b)(1) or (b)(2) action.⁶

Q 3.1.1 What is the impact of qualifying under more than one subsection of Rule 23(b)?

In a sense, Rule 23(b)(1)(A) protects those who oppose the class; Rule 23(b)(1)(B) protects those who compose the class.⁷ Moreover, a class plaintiff's attempt to secure money damages under Rule 23(b)(3) may be inconsistent with the allegation that the class is primarily seeking injunctive relief under Rule 23(b)(2). Nevertheless it is possible for some proposed actions to meet the requirements of more than one subdivision of Rule 23(b).⁸ Indeed, actions under Rule 23(b)(1)(A) and (B) are generally treated in the same manner for purposes of other portions of the class action rule.”

However, the result will likely be different if an action falls under both Rule 23(b)(1) and (b)(3). In such cases, most courts have held that Rule 23(b)(1) should control to achieve the purposes of the Rule, which are to avoid a multiplicity of suits, provide common binding adjudication, and prevent inconsistent or varying adjudications.⁹

Q 3.1.2 What due process considerations impact mandatory class actions?

Due process limitations associated with mandatory class actions are not well defined. In *Phillips Petroleum Co. v. Shutts*, the Supreme Court held that due process is not violated when a state court asserts personal jurisdiction over absent class members who have minimal contacts with the state in which the litigation is conducted.¹⁰ The Court held that due process does not require a plaintiff to affirmatively “opt in” (but delineated the due process foundation of the “opt-out” procedure under Rule 23(b)(3)). The Court limited its holding to “those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments,” and said that it expressed “no view concerning other types of class actions, such as those seeking equitable relief.”¹¹ In a later case involving a Rule 23(b)(1)(B) settlement class, *Ortiz v. Fibreboard Corp.*, the Court dealt with the due process issue summarily and left it largely unresolved.¹² Thus, the due process requirements for mandatory, non-opt-out classes have yet to be definitively established.

Mandatory and Opt-Out Class Differences

Q 3.2 How do mandatory and opt-out classes compare?

Rule 23(b)(1) and (b)(2) classes are known as mandatory because a judgment is binding on all class members, no class member may opt out (usually),¹³ and notice to absent class members is not required.¹⁴

The Supreme Court has held that in a Rule 23(b)(3) class action, due process requires notice, an opportunity to appear in person or by counsel, an opportunity to “opt out,” and adequate representation.¹⁵ Less strict due process protections for Rule 23(b)(1) and 23(b)(2) class members are justified because members have homogeneous, cohesive interests, and are not pursuing individual damage claims.¹⁶

In limited circumstances, courts permit an exception to the general rule that class members in a mandatory class action cannot opt out (noting that “courts have narrow discretionary power to allow exclusion”).¹⁷ These courts premise the authority to provide opt-out rights on Rule 23(d)(1)(E), which provides federal courts with the authority to issue orders dealing with procedural matters.¹⁸

State variations on mandatory class actions under Rules 23(b)(1) and (b)(2) are less significant than those dealing with actions under Rule 23(b)(3).¹⁹ A significant majority of the states track the federal phrasing of Rule 23(b) verbatim.²⁰

Rule 23(b)(1)(A)

Q 3.3 What is an action based on a risk of incompatible standards of conduct?

Under Rule 23(b)(1)(A), a class action may be maintained if prosecuting separate actions would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for the party opposing the class.²¹ The concern of Rule 23(b)(1)(A) is that individual actions could negatively affect the party opposing the class, which is typically the defendant. The crux of Rule 23(b)(1)(A) is dependent on the defendant’s risk of being unable to act in response

to multiple judgments, for example, where a defendant is sued by different plaintiffs asking for different and incompatible relief.²²

In reviewing the types of cases referenced by the Advisory Committee's Note to Rule 23(b)(1)(A), the Supreme Court said that Rule 23(b)(1)(A) "takes in cases where the party is obliged by law to treat the members of the class alike (e.g., a utility acting toward customers, or a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (for example, a riparian owner using water as against downriver users)."²³

Q 3.3.1 What are the purposes of Rule 23(b)(1)(A)?

Rule 23(b)(1)(A) is intended to protect the interests of the party opposing the class action, and is designed to obviate the actual or potential dilemma that would confront a party opposing a class when incompatible adjudications would prevent the party from being able to comply with one judgment without violating the terms of another.²⁴

Although at least one court has held that Rule 23(b)(1) is applicable only in those cases in which there is a total absence of individual issues,²⁵ that view has been called too restrictive.²⁶ More commonly, subdivision (b)(1)(A) applies when practical necessity compels the opposing party to act in the same manner toward the individual class members and therefore makes inconsistent adjudications in separate actions unworkable.²⁷

However, because Rule 23(b)(1)(A) is designed to protect defendants against the risk of being faced with incompatible standards of conduct, if the defendants are willing to accept such a risk (whether real or illusory), some courts hold that certification of the plaintiff class may be denied.²⁸

Q 3.3.2 What are major requirements for certification under Rule 23(b)(1)(A)?

For a class to be certified under Rule 23(b)(1)(A), the party seeking class certification must demonstrate a likelihood that separate actions will in fact be brought if a class action is not permitted.²⁹ Otherwise, there is no danger that incompatible standards of conduct will be imposed by the courts.

A widely recognized limitation on Rule 23(b)(1)(A) certification requires that there be more than a mere possibility that inconsistent judgments and resolutions of identical questions of law would result absent a class action.³⁰ A likelihood of inconsistent but not truly incompatible standards of conduct likewise does not satisfy the rule.³¹

Q 3.3.3 What if a class is seeking monetary damages?

Rule 23(b)(1)(A) is typically not applicable in an action for monetary relief or damages.³² The purpose of Rule 23(b)(1)(A) is to eliminate situations in which the defendant would be required to follow inconsistent courses of continuing conduct.³³ As one court of appeals has stated, “[i]nfrequently, if ever, will this be the case when the action is for money damages.”³⁴ Certification under Rule 23(b)(1)(A) is generally used to obtain injunctive or declaratory relief.³⁵

The majority rule is that class actions seeking to recover money damages cannot properly be certified for class treatment under Rule 23(b)(1)(A).³⁶ The rationale is typically that if classes seeking damages could be certified under Rule 23(b)(1)(A) because of a risk of creating incompatible standards, then Rule 23(b)(1)(A) would displace Rule 23(b)(3), which is the traditional route for seeking damages in class actions. Rule 23(b)(3), however, provides absent class members with more due process protections than Rule 23(b)(1)(A), because Rule 23(b)(3) requires that absent class members be given notice and the opportunity to opt out. Thus, many courts reason that Rule 23(b)(1)(A) should not be read to render Rule 23(b)(3) superfluous.³⁷ The Supreme Court has also cautioned that use of mandatory classes for litigation seeking only (or primarily) monetary damages may raise constitutional concerns.³⁸

Rule 23(b)(1)(B)

Q 3.4 What is a limited fund class?

Rule 23(b)(1)(B) permits a class action to be maintained where there is a risk that adjudications with respect to individual members of the class would, as a practical matter, be dispositive of the interests of other members not parties to the adjudications.³⁹

One category of Rule 23(b)(1)(B) class action is the “limited fund” case. The Advisory Committee’s Note remarks that:

[I]n various situations, an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem.

Thus, many Rule 23(b)(1)(B) class actions involve limited pools of money that may be inadequate to cover the claims of all plaintiffs.⁴⁰ “Classic” limited fund class actions “include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, [or] proceeds of a ship sale in a maritime accident suit.”⁴¹

The limited nature of the funds available to satisfy the individual claimants must be clear.⁴² A mere allegation that the defendant has limited resources will be insufficient.⁴³ Furthermore, a limited fund cannot exist merely by agreement of the parties.⁴⁴ In discussing the requirements to qualify as a “limited fund” (in a settlement class context), the Supreme Court said that “the settling parties must present not only their agreement, but evidence on which the district court may ascertain the limit and the insufficiency of the fund, with support in findings of fact following a proceeding in which the evidence is subject to challenge.”⁴⁵

Federal courts have differed somewhat in articulating the standard to evaluate whether a fund is, in fact, limited in cases involving mass torts.⁴⁶ Some courts have stated that class certification under Rule 23(b)(1)(B) is not proper for independent tort claims seeking compensatory damages unless separate actions will inescapably compromise the claims of absent class members.⁴⁷ However, other courts have held that the likelihood of fund depletion must be one of a substantial probability (more than a mere possibility) that if damages are awarded, the claims of earlier litigants would exhaust the defendants’ assets.⁴⁸ Another court articulated that there be a “real risk” of fund impairment.⁴⁹

Q 3.4.1 What are the requirements for “limited fund” treatment?

In *Ortiz v. Fibreboard Corporation*, the Supreme Court reviewed the certification of a settlement class on a limited fund theory, and rendered an important decision defining the standard to be used for certification of limited fund classes under Rule 23(b)(1)(B).⁵⁰ The Court looked to the Advisory Committee’s Notes and the historical antecedents for the rule, and counseled close adherence to the historical model.⁵¹ The “presumptively necessary” conditions for certification in limited fund cases are: 1) the total of the aggregated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all claims; 2) the whole of the inadequate fund is to be devoted to the overwhelming claims; and 3) the claimants, identified by a common theory of recovery, must be treated equitably among themselves.⁵² The class should be comprised of everyone who might state a claim on a single or repeated set of facts, invoking a common theory of recovery to be satisfied from the limited fund as the source of payment.⁵³

Unlike Rule 23(b)(1)(A), it is not necessary to show that separate actions are likely or feasible in order to invoke Rule 23(b)(1)(B).⁵⁴ The rule also does not require that individual adjudications be legally binding on the absentees; however, the party seeking class certification must be able to allege more than that an individual adjudication may be given stare decisis effect in other lawsuits (some greater practical effect must be shown).⁵⁵

Prior to *Ortiz*, some courts certified Rule 23(b)(1)(B) classes in mass tort litigation,⁵⁶ while others did not.⁵⁷ In the *Ortiz* decision, the Supreme Court did not prohibit outright the use of Rule 23(b)(1)(B) to aggregate individual tort claims.⁵⁸ But the Court cautioned against “adventurous application” of the rule and warned that such cases do not fit within the rule’s historical paradigm.⁵⁹ The Court thus set a very high threshold for certification of a limited-fund class under Rule 23(b)(1)(B), and the lower courts have ruled accordingly.⁶⁰

Q 3.4.2 Does Rule 23(b)(1)(B) apply to punitive damages?

Under the “limited generosity”⁶¹ or “limited punishment”⁶² theory, certification of a class under Rule 23(b)(1)(B) may be justified by the

possibility of insufficient assets to pay multiple punitive damages awards or by the possibility that under state law, as a matter of policy or federal law as a matter of due process, a defendant can be liable for no more than one award of punitive damages.⁶³ Assuming that a mandatory class may be certified under Rule 23(b)(1)(B) on such grounds, one court has held it is an abuse of discretion to certify the class without adequate findings as to the potential amount and scope of punitive damages.⁶⁴

However, the “limited punishment” theory has been rejected by some courts post-*Ortiz*, reasoning that certification under the theory does not align with the Court’s admonition that limited fund cases should be moored to the Rule’s historical antecedents.⁶⁵

To mitigate multiple and excessive punitive damage awards, some courts have permitted the parties to present evidence or instructions to the jury on the issue. For example, one court has said that if applicable state law requires that there be a reasonable relationship between any punitive damages and compensatory damages awarded to particular claimants, the class action jury can be instructed as to this principle, a punitive damages fund can be established at the time of the trial of the class action, and the punitive damages fund can be subsequently apportioned among individual claimants at the time of their individual compensatory awards.⁶⁶ Another has said that a trial court, in passing on future claims, “may admit evidence as to the payment of prior awards which may be used by a jury to reduce an award to a party seeking additional punishment for the same misconduct.”⁶⁷

Q 3.4.3 What are the other major types of Rule 23(b)(1)(B) cases?

While the most common example of the type of action to which Rule 23(b)(1)(B) applies is the “limited fund” case, the rule is applicable in any situation where an adjudication by one member of a class would substantially “impair or impede” the ability of other members to protect their own interests. The determination of whether a particular action falls within this rule depends on the facts of each case, but the Advisory committee notes that a risk of impairment may be found in suits brought to reorganize fraternal benefit societies, actions by shareholders to declare a dividend or otherwise to “fix their rights,”

and actions charging a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of beneficiaries, requiring an accounting or similar procedure to restore the subject of the trust.⁶⁸

Suits in which injunctive or declaratory relief is sought are more frequently brought under Rule 23(b)(2), but some courts hold that Rule 23(b)(1)(B) may apply because an individual action seeking relief of that type can, in many situations, “affect the interests of all class members.”⁶⁹

Notes

1. FED. R. CIV. P. 23(b)(1).
2. FED. R. CIV. P. 23(b)(2).
3. See *Cashman v. Dolce Int'l/Hartford Inc.*, 225 F.R.D. 73, 92 (D. Conn. 2004) (“Class actions under Rules 23(b)(1) and 23(b)(2) are often described as ‘mandatory’ classes, because individual class members may not opt out of the class action and pursue separate litigation that might prejudice other class members or the defendant.”).
4. See discussion in Q 3.2 regarding how mandatory and opt-out classes compare.
5. FED. R. CIV. P. 23(c)(2)(B) (“For any class certified under Rule 23(b)(3), the court must direct notice to class members the best notice that is practicable under the circumstances”).
6. FED. R. CIV. P. 23(c)(2)(A) (“For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.”).
7. *Corley v. Entergy Corp.*, 222 F.R.D. 316 (E.D. Tex. 2004).
8. *Smith v. Tower Loan of Miss., Inc.*, 216 F.R.D. 338 (S.D. Miss. 2003).
9. See, e.g., *Mungin v. Fla. E. Coast Ry. Co.*, 318 F. Supp. 720, 730 (M.D. Fla. 1970); *aff'd* 441 F.2d 728 (5th Cir. 1971); *In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1266 (10th Cir. 2004); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 (9th Cir. 1976).
10. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).
11. *Id.* at n.3.
12. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 838–841 (1999); see also Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177, 206–07 (2003).
13. Opt-out rights are typically not given to Rule 23(b)(1) and (b)(2) class members. See, e.g., *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1544 (11th Cir. 1987) (“Members of a (b)(3) class, but not those of a (b)(1) class, may choose to opt out and not be bound by the judgment.”); *Green*, 541 F.2d at 1339. But see discussion within this section regarding how some courts have fashioned a limited exception to this rule.
14. See *In re Dennis Greenman*, 829 F.2d at 1544.
15. *Phillips Petroleum*, 472 U.S. at 812.
16. *Id.*
17. *Cnty. of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1303 (2d Cir. 1990); see *id.* at 1305 (holding that a district court judge has the discretion, in a proper case, to permit Rule 23(b)(1)(B) class members to opt out).
18. See *id.* at 1304.

19. Thomas D. Rowe, Jr., *State and Foreign Class-Actions Rules and Statutes: Differences From—and Lessons For?—Federal Rule 23*, 35 W. ST. U. L. REV. 147, 156 (2007) (explaining that only New Hampshire and South Carolina lack state counterparts to Rule 23(b); however, neither those states nor others appear to have made significant variations on mandatory class actions).

20. *See id.*

21. FED. R. CIV. P. 23(b)(1)(A).

22. *See Abramovitz v. Ahern*, 96 F.R.D. 208, 215 (D. Conn. 1982).

23. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (citing Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 388 (1967)).

24. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1194 (9th Cir. 2001) (the danger Rule 23(b)(1)(A) warns against “exists in those situations in which the defendant by reason of the legal relations involved cannot as a practical matter pursue two different courses of conduct.”).

25. *Tober v. Charnita*, 58 F.R.D. 74, 81 (M.D. Pa. 1973).

26. 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1773, 22 (3d ed. 2005).

27. *See Rhodes v. E.I. du Pont de Nemours & Co.*, 253 F.R.D. 365 (S.D. W. Va. 2008)

28. *See Alsup v. Montgomery Ward & Co.*, 57 F.R.D. 89, 92 (N.D. Ca. 1972); *Kenney v. Landis Fin. Grp.*, 349 F. Supp. 939, 951 (N.D. Iowa 1972). *But see In re First Am. Corp. ERISA Litig.*, 258 F.R.D. 610 (C.D. Cal. 2009) (although some courts interpret Rule 23(b)(1)(A) as protecting defendants only, clearly all litigants as well as the courts benefit from consistency in the adjudication of claims of individual class members).

29. *E.g., In re Dennis Greenman*, 829 F.2d at 1544; *Eisen v. Carlisle & Jacqueline*, 391 F.2d 555, 564 (2d Cir. 1968); *Eliassen v. Green Bay & Western R.R. Co.*, 93 F.R.D. 408, 412 (E.D. Wis. 1982) (denying certification under Rule 23(b)(1)(A) because plaintiff could not demonstrate a likelihood that separate actions would be brought if a class action were not permitted), *aff'd*, 705 F.2d 461 (7th Cir.), *cert. denied*, 464 U.S. 874 (1983).

30. *In re Integra Realty Res. Inc.*, 354 F.3d 1246, 1263–64 (10th Cir. 2004) (citing *Nat’l Union Fire Ins. Co. v. Midland Bancor, Inc.*, 158 F.R.D. 681, 687 (D. Kan. 1994)).

31. *Abramovitz*, 96 F.R.D. at 215; *In re Benedictin Prods. Liab. Litig.*, 749 F.2d 300, 305 (6th Cir. 1984) (“The fact that some plaintiffs may be successful in their suits against a defendant while others may not is clearly not a ground for invoking Rule 23(b)(1)(A).”); *see also Zinser*, 253 F.3d at 1193.

32. *See, e.g., Green*, 541 F.2d at 1340; *McDonnell-Douglas Corp. v. U.S. Dist. Ct.*, 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); *see also Ratner v. Chem. Bank N.Y. Trust Co.*, 54 F.R.D. 412, 415 n.5 (“the court need not and does not reach the broader defense argument, supported by scholarly authority, that this provision was not meant as a vehicle for class claims asserting the kind of monetary liability here in question.”).

33. Rosario v. King & Prince Seafood Corp., 2006 WL 2367130 (S.D. Ga. Mar. 7, 2006); *see also* La Mar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973).
34. *La Mar*, 489 F.2d at 466.
35. *See In re Dennis Greeman*, 829 F.2d at 1545.
36. *See Id.* at 1545 (“Many courts confronting the issue have held that Rule 23(b)(1)(A) does not apply to actions seeking compensatory damages.” (citing Zimmerman v. Bell, 800 F.2d 386, 389 (4th Cir. 1986); Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1340 n.10 (9th Cir. 1976); Reade-Alvarez v. Eltman, Eltman & Cooper, P.C., 2006 WL 941765 (E.D.N.Y. Apr. 12, 2006)).
37. *See La Mar*, 489 F.2d at 466; *see also McDonnell*, 523 F.2d at 1086; *Cashman*, 225 F.R.D. at 93.
38. *Ortiz*, 527 U.S. at 845–46 (discussing Seventh Amendment and due process concerns related to mandatory class actions for monetary damages).
39. FED. R. CIV. P. 23(b)(1)(B).
40. *Ortiz*, 527 U.S. at 834.
41. *Id.* (citing FED. R. CIV. P. 23(b)(1)(B) advisory committee’s note).
42. *Ortiz*, 527 U.S. at 849.
43. *In re Dennis Greeman*, 829 F.2d at 1546.
44. *Ortiz*, 527 U.S. at 848–49.
45. *Id.* The Court did not decide “how close to insolvency a limited fund defendant must be brought as a condition of class certification,” but noted with disapproval that the defendant was permitted to maintain “virtually its entire net worth.” *Id.* at n.34.
46. *Id.* at n.26.
47. *In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 851 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).
48. *See Jenkins v. Raymark Indus., Inc.*, 109 F.R.D. 269 (E.D. Tex. 1985), *aff’d* 782 F.2d 468 (5th Cir. 1986); *In re “Agent Orange” Prod. Liab. Litig.*, 100 F.R.D. 718, 726 (E.D.N.Y. 1983), *aff’d*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).
49. *In re First Commodity Corp. of Boston Customer Accounts Litig.*, 119 F.R.D. 301, 312 (D. Mass. 1987).
50. *Ortiz*, 527 U.S. at 838–39.
51. *See id.* at 842 (“the burden of justification rests on the proponent of any departure from the traditional norm.”).
52. *Id.* at 838–39.
53. *Id.*
54. *Bouaphakeo v. Tyson Foods, Inc.*, 564 F. Supp. 2d 870 (N.D. Iowa 2008); *see also In re Dennis Greeman Sec. Litig.*, 829 F.2d at 1546 n. 9.
55. *See In re Dennis Greeman*, 829 F.2d 1546; *Larionoff v. U.S.*, 533 F.2d 1167, 1181 n.36 (D.C. Cir. 1976) *aff’d*, 431 U.S. 864(1977); *In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1264 (10th Cir. 2004); *La Mar*, 489 F.2d at 467. However, a few courts recognize a limited exception to this rule where the stare decisis effect of the judgment with respect to the claim of one individual is likely to have a compelling

impact on future litigation by persons similarly situated because no real individual issues exist to distinguish the earlier precedent. *See, e.g., Coca-Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola Co.*, 98 F.R.D. 254 (D. Del. 1983).

56. *See, e.g., In re "Agent Orange,"* 100 F.R.D. 718; *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986); *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977).

57. *See, e.g., Nat'l Auto Brokers Corp. v. Gen. Motors Corp.*, 60 F.R.D. 476 (S.D.N.Y. 1973), *aff'd*, 612 F.2d 604 (2d Cir. 1979), *cert. denied* 448 U.S. 914 (1980).; *La Mar*, 489 F.2d at 465–67; *McDonnell*, 523 F.2d at 1085.

58. *Ortiz*, 527 U.S. at 844 (1999).

59. *Id.* at 843 (“the Advisory Committee did not contemplate that the mandatory class action codified in subdivision (b)(1)(B) would be used to aggregate unliquidated tort claims on a limited fund rationale.”).

60. *Klein v. O'Neal, Inc.*, 2006 WL 325766 (N.D. Tex. Feb. 13, 2006); *see, e.g., Cashman*, 225 F.R.D. at 93.

61. *In re School Asbestos*, 789 F.2d at 1005–06 (describing the “limited generosity” theory as “punitive damages overkill,” and “the functional equivalent of the limited fund in that, by operation of the limited generosity principle, only a limited amount of punitive damage funds will be available, regardless of the ability of the defendants to pay”).

62. *In re Simon II Litig.*, 407 F.3d 125, 134 (2d Cir. 2005) (explaining that under the “limited punishment” theory, the “limited fund involved would be the constitutional cap on punitive damages, set forth in *BMW v. Gore* (citation omitted) and related cases.”).

63. *See In re School Asbestos*, 789 F.2d at 1005–06; *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. at 728.

64. *In re School Asbestos*, 789 F.2d at 1005.

65. *In re Simon II*, 407 F.3d at 137–38.

66. *Jenkins v. Raymark Indus.*, 109 F.R.D. 269, 280 (E.D. Tex. 1985); *aff'd* 782 F.2d 468 (2d Cir. 1986).

67. *In re "Agent Orange,"* 100 F.R.D. at 728.

68. FED. R. CIV. P. 23(b)(1)(B) advisory committee’s note.

69. *Wright, Miller & Kane, supra* note 26, at 39; *see, e.g., Collins v. Bolton*, 289 F. Supp. 393, 397–98 (N.D. Ill. 1968).