The Good, the Bad, and the Ambiguous: Recent Developments in West Virginia's Class Action Jurisprudence

Brad Dorsey
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Civil Procedure Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol107/iss1/11

This Student Work is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
THE GOOD, THE BAD, AND THE AMBIGUOUS:
RECENT DEVELOPMENTS IN WEST VIRGINIA'S
CLASS ACTION JURISPRUDENCE

I. INTRODUCTION ................................................................. 262

II. THE GOOD: CLEAR BOUNDARIES FOR THE CIRCUIT
COURT AT THE CERTIFICATION STAGE ............................... 265
   A. Evidentiary Hearings on the Issue of Certification
      Under Burks v. Wymer ........................................... 265
   B. Evidentiary Hearings on the Issue of Certification
      Revisited in Rezulin ............................................. 268

III. THE BAD: THE EVER-SHRINKING DISCRETION OF THE
CIRCUIT COURT IN THE CERTIFICATION PROCESS .......... 269
   A. The Supreme Court of Appeal's Reversal in Rezulin:
      Abuse of Discretion or Abuse of Power? .................... 272
      1. Comparing and Contrasting the Supreme
         Court of Appeal's Opinion in Rezulin with the
         Findings of the Circuit Court of Raleigh County .... 273
         a. Conflicting Interpretations of West
            Virginia Rule of Civil Procedure 23(a) .......... 276
         b. Conflicting Interpretations of West
            Virginia Rule of Civil Procedure 23(b) .......... 280
      2. Result-Oriented Decision Making or Sound
         Judicial Reasoning? ........................................... 283
   B. The Bad Aspects of Love v. Georgia-Pacific ............... 285
   C. Things Could Always be Worse ............................... 288
   D. The Big Picture ................................................... 289

IV. THE AMBIGUOUS: A SECOND LOOK AT REZULIN .......... 289

V. CONCLUSION ................................................................. 294

261
I. INTRODUCTION

West Virginia is a hellhole. You didn't know? According to the American Tort Reform Association, a special interest group aimed at promoting business interests, West Virginia is a "judicial hellhole" because of recent decisions that are more "consumer friendly" than "corporate friendly." This characterization can be partially attributed to recent changes in West Virginia's class action jurisprudence.

These changes were set in motion in 1998, when the West Virginia Supreme Court of Appeals amended Rule 23 of the West Virginia Rules of Civil Procedure, making it nearly identical to the 1966 version of Rule 23 of the Fed-


2 The 1998 amendment to West Virginia Rule of Civil Procedure 23 significantly changed the certification requirements for class actions in West Virginia. West Virginia Rule of Civil Procedure subsections 23(a) and (b), which are the relevant sections for the purposes of this article, now read 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.

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

(1) The prosecution of separate actions by or against individual members of the class would create a risk of

(A) 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

(B) 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 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: (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 already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the
eral Rules of Civil Procedure. This amendment presented a challenge to West Virginia attorneys, as well as circuit courts, because most of the court's decisions interpreting the prior version of Rule 23 were rendered either partially or totally obsolete. Although there is much case law interpreting the substantially similar Federal Rule, the West Virginia court is not bound to interpret its Rule in the same manner. Recently, the court made this point abundantly clear in a landmark decision, In re West Virginia Rezulin Litig. v. Hutchison.

This opinion by the Supreme Court of Appeals is significant for many reasons. For the first time since the 1998 amendment to Rule 23, the West Virginia Supreme Court has thoroughly discussed and defined class certification requirements under the amended Rule. It is also the first time that the Supreme Court of Appeals certified a products liability class action, which is a signifi-

---


5 "Although we may look to federal decisions for guidance in interpreting our civil rules... we are by no means bound by those decisions." Brooks v. Isinghood, 584 S.E.2d 531, 538 (W. Va. 2003) (quoting Darling v. Champion Home Builders Co., 638 P.2d 1249, 1251 (Wash. 1982)).

6 585 S.E.2d at 52. Rezulin is the trade name for the drug troglitazone, an oral drug that was developed to treat Type II (adult onset) diabetes. Id. at 58. After its approval in early 1997 by the Food and Drug Administration, the drug was marketed and sold by the defendants, Warner-Lambert Company and Parke-Davis & Company, from February 1997 until March 2000, at which time the defendants voluntarily withdrew the drug from the marketplace. Id. at 58-59. The proposed class consisted of "all persons who either consumed the drug Rezulin in West Virginia or consumed the drug Rezulin after having had the drugs prescribed or sold to them in West Virginia" alleged an increased risk of liver injury and that the defendants knowingly marketed a defective product. Id. at 60.

7 See id. at 64-67. Section III, subsection C and D of the Court's opinion discusses the certification requirements under the amended West Virginia Rule of Civil Procedure 23(a) and (b). Id.

8 The list is rather long of cases that have denied class certification in drug and medical de-
cant departure from prior West Virginia case law, which did not permit drug and medical device class actions.\(^9\) Since Rezulin, the Court has further interpreted West Virginia’s Rule 23 on two occasions: first, in \textit{Ways v. Imation Enterprises Corp.},\(^{10}\) and thereafter in \textit{Love v. Georgia-Pacific Corp.}.\(^{11}\) The latter two cases do not have as much of an impact on West Virginia’s class action jurisprudence as Rezulin, but they do help shape West Virginia’s evolving class action device. Therefore, \textit{Love} and \textit{Ways} will not be discussed in this Note to the same extent as \textit{Rezulin}.

The primary focus of this Note is the development of West Virginia’s class action jurisprudence. While the court has answered several questions by setting forth some clear guidelines in recent decisions, it has also headed down some undesirable paths, creating uncertainty along the way. This is a crucial period for interpreting West Virginia’s Rule 23; therefore, it must be done with care, and with one eye on the future.

Part I of this Note addresses “the good” aspects of West Virginia’s class action system and how Rezulin has improved the certification process. Particularly, it looks at how the court has set clear boundaries for the circuit court in the certification of class actions and the importance of these boundaries.

Part III examines “the bad” aspects of Rezulin and its progeny. This section discusses how the West Virginia Supreme Court of Appeals has failed to give the appropriate amount of deference to the circuit court in deciding whether certification is appropriate. In its recent cases the West Virginia Supreme Court has set forth an abuse of discretion standard of review but has not adhered to it. This will be demonstrated by reviewing the findings of the Circuit Court of Raleigh County in Rezulin and the findings of the Circuit Court of Fayette County in Love.

\(^9\) In 1982, the West Virginia Supreme Court of Appeals in \textit{Burks v. Wymer} specifically rejected class actions in drug and medical device cases stating: “[s]tate and federal courts have concurred in judging certain factual settings inappropriate for class action treatment.” 307 S.E.2d 647, 650 (W. Va. 1983), superseded by statute as stated in Rezulin, 585 S.E.2d at 64. “Proposed classes composed of persons alleged to have been injured by improper medical treatment have generally been rejected by the courts.” \textit{Id.} The Court in \textit{Burks} went on to discuss the Ninth Circuit’s decision in the Dalkon Shield litigation and quoted from its opinion: “No single happening or accident occurs to cause similar types of physical harm or property damage.” \textit{Id.} No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant.” \textit{Id.} (quoting \textit{In re Northern Dist. of California Dalkon Shield IUD Products Liab. Litig. v. A. H. Robbins Co.}, 693 F.2d 847, 853 (9th Cir. 1982)).

\(^{10}\) 589 S.E.2d 36 (W. Va. 2003).

\(^{11}\) 590 S.E.2d 677 (W. Va. 2003).
Part IV focuses on an ambiguity in *Rezulin* that the court needs to address. Virtually all commentators agree that it is not proper to certify a class action under 23(b)(2) if 23(b)(3) is applicable.\(^2\) If the reader is already acquainted with *Rezulin* he or she may be asking at this point, "Didn't the West Virginia Supreme Court certify a class under both 23(b)(2) and 23(b)(3)?" This question will be addressed, as well as how the supreme court of appeals should remedy this potential problem.

II. THE GOOD: CLEAR BOUNDARIES FOR THE CIRCUIT COURT AT THE CERTIFICATION STAGE

A. Evidentiary Hearings on the Issue of Certification Under Burks v. Wymer

It is common practice for a circuit court to conduct an evidentiary hearing on the issue of class certification, especially if certification will be denied.\(^3\) *Rezulin* reevaluated the scope of the evidentiary certification hearing in West Virginia, and gave circuit courts much more guidance than under prior case law. Prior to *Rezulin*, the leading case on class certification in West Virginia was *Burks v. Wymer*.\(^4\) Although *Burks* states as a general rule that the merits of a class action may not be considered at the certification stage, it contained some additional language that could be distorted or manipulated by both plaintiffs and defendants.

The *Burks* court began its discussion of whether the merits of a class action should be considered at the certification stage by quoting Professor Arthur Miller, a leading commentator who advocated for the implementation and employment of discovery and pre-trial hearings in the certification stage.\(^5\) Professor Miller first noted how the typical motion for certification is drafted in more conclusory terms than persuasive, as to whether the requisites for certification are met, and how little this type of motion aids a judge faced with the decision of whether a class action is appropriate.\(^6\) Professor Miller concludes his en-

---

\(^2\) See, e.g., CLECKLEY, DAVIS & PALMER, supra note 3, at 458 (citations omitted). Likewise, commentators agree that dual certification under both 23(b)(1) and 23(b)(3) is not proper. See id. This note only discusses dual certification under 23(b)(2) and 23(b)(3).

\(^3\) FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (THIRD) 216-17 (1995).


\(^5\) Id. at 654.

\(^6\) Id.
endorsement of the use of discovery methods by stating "[t]he certification issue is too important to permit the lawyers to furnish boiler plate memoranda laden with self-serving conclusions."  

Seemingly, the West Virginia Supreme Court agreed with Professor Miller's rationale. Directly following the preceding quote of Professor Miller, the Court stated "in most cases, an exploration beyond the pleadings is essential to make an informed judgment on the propriety of a proposed spurious class action." Briefly, the term "spurious" refers to one of the three types of class actions that could be brought under the former version of West Virginia Rule 23. A "spurious" class action could be maintained, "where the character of the right is several and a common question of law or fact is presented and a common relief is sought." Although the spurious class action is similar in many respects to an action under 23(b)(3), courts have realized that the Federal Rule of Civil Procedure 23 Advisory Committee did not intend for nicknames to be given to the 1966 revisions, and have therefore refrained from resorting to the old "true," "hybrid," and "spurious" labels when referring to the current provisions of Rule 23(b).

The failure of the Burks court to define "an exploration beyond the pleadings" led to intended confusion. A reasonable interpretation of "an exploration beyond the pleadings" might permit a circuit court to inquire into basic factual and legal issues when considering whether certification is appropriate. If taken in context of Professor Miller's statement, "an exploration beyond the pleadings" could mean that the circuit court is not strictly limited, and it could consider materials obtained in discovery, depositions, interrogatories, requests for admission, as well as testimony received in pre-trial hearings. However, the Burks court placed a limitation as to what the circuit court could consider at this representative. In most cases the judge will learn precious little from a document like that and probably even less from the defendant's equally conclusory arguments that the class action prerequisites have not been satisfied.

Id. (quoting ARTHUR MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS, PAST, PRESENT, AND FUTURE 14-15 (1977)).

17 Id.
18 Id.
19 Id.
20 See MARLYN E. LUGAR & LEE SILVERSTEIN, WEST VIRGINIA RULES 196 (1960). The 1938 version of Rule 23 divided classes into three categories: true, hybrid, and spurious. See id.
23 See Burks, 307 S.E.2d at 654.
stage by using further limiting language.\(^\text{24}\) It cautioned that "pre-trial hearings are to be carefully limited" and quoted from the United States Supreme Court's decision *Eisen v. Carlisle and Jacquelin*:\(^\text{25}\) "Nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."\(^\text{26}\)

The problem with *Burks* was not its rationale, but the way the statements were being isolated. An attorney crafting a motion for or against certification could quote any of the following statements and cite *Burks*:\(^\text{27}\)

a. "an exploration beyond the pleadings is essential to make an informed judgment on the propriety of a . . . class action."\(^\text{28}\)

b. "[n]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."\(^\text{29}\)

c. "pre-trial hearings are to be carefully limited."\(^\text{30}\)

d. "the Supreme Court's ruling in *Eisen* is not inconsistent with a full pretrial exploration of the case to ensure that it is an appropriate class action."\(^\text{31}\)

These statements were never intended to be isolated. A close reading of the entire opinion in *Burks* indicates that the court envisioned the statements to be read together. The reason *Burks* cited *Eisen* was because it had the same fear as the West Virginia Court had in *Rezulin* – neither wanted a motion for class certification to become a mini-trial on the merits.\(^\text{32}\) However, *Burks* also realized the importance of actually satisfying the requisites of class certification and not merely accepting the plaintiff's conclusory allegations as being true, or accepting the defendant's denials as being true. *Burks* clearly called for a rigorous analysis of the requisites for certification. This is reflected in the Court's final statement in *Burks*: "*Eisen* is not inconsistent with a full pretrial exploration of

\(^{24}\) See id.


\(^{26}\) *Burks*, 307 S.E.2d at 654 (quoting *Eisen*, 417 U.S. at 177).

\(^{27}\) For an example, see pages 29-30 of the Petition for Appeal From the Order of the Circuit Court of Raleigh County filed in the *Rezulin* case. The Petitioners seem to isolate statements (b) and (c) in their argument and ignore (d), whereas in pages 20-21 of the Appellees Opposition to Petition for Appeal the Appellees isolate statement (d) and limit the application of *Eisen*.

\(^{28}\) *Burks*, 307 S.E.2d at 654.

\(^{29}\) Id. at 654 (quoting *Eisen*, 417 U.S. at 177).

\(^{30}\) Id.

\(^{31}\) Id.

the case to ensure that it is an appropriate class action." This statement is essentially a compromise of Professor Miller's viewpoint and the view set forth by the United States Supreme Court in Eisen. This compromise permits a circuit court to conduct an inquiry into the basic factual and legal issues to ensure certification was appropriate. This was the framework to be used by circuit courts when Rezulin was decided by the Circuit Court of Raleigh County in 2001.

The Circuit Court of Raleigh County allowed experts to give testimony at a two-day certification hearing for a proposed class of Rezulin users and concluded, "the evidence shows that Rezulin was not a defective product for [the plaintiffs]." While this finding is clearly on the merits, it is arguably within the range of factual inquiry permitted by Burks. The supreme court of appeals took the opportunity in Rezulin to reevaluate the scope of pretrial hearings in West Virginia.

B. Evidentiary Hearings on the Issue of Certification Revisited in Rezulin

In Rezulin, the supreme court of appeals set forth a clear certification standard by omitting the language from Burks concerning "pre-trial explorations" and restating Eisen's holding that an inquiry into the merits cannot be made. It emphasized that circuit courts should not ask "whether the . . . plaintiffs have stated a cause of action or will prevail on the merits, but rather whether that the requirements of Rule 23 are met." This is consistent with the approach taken under the Federal Rule of Civil Procedure 23. In 1996, the Federal Rules of Civil Procedure Advisory Committee rejected an amendment that would require federal courts to make findings related to the probable outcome on the merits.

In Rezulin, the West Virginia Supreme Court of Appeals took the stance that any doubts as to whether certification is appropriate should be resolved in favor of the class. The practical effect of Rezulin in a certification proceeding is that a circuit court is forced to accept the plaintiff's factual allegations as being true, regardless of the defendant's position on the merits, and it may certify a class even before liability has been proven. Whether this result is liked or dis-

33 Burks, 307 S.E.2d at 654 (emphasis added). Other courts have interpreted Eisen as only meaning that "the strength of a plaintiff's claim should not affect the certification decision." Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996). Other Courts have rejected Eisen altogether. See Szabo v. Bridgeport Machines Inc., 249 F.3d 672, 677 (7th Cir. 2001).

34 Rezulin, 585 S.E.2d at 63.

35 Id.

36 Id. (quoting Miller v. Mackey Intern., Inc., 452 F.2d 424, 427 (5th Cir. 1971)).

37 Id. at 63 n.7.


39 Rezulin, 585 S.E.2d at 65.
liked, circuit courts finally have a clear ground rule and a standard that cannot be distorted or manipulated.

As a result of this liberal certification standard,\(^4\) many more classes may qualify for certification. In fact, it may now be easier to certify drug cases, prescription or over-the-counter, and possibly a medical malpractice class action. A further result of *Rezulin* may be a decreased number of certification hearings. Circuit courts may see no need to hear live testimony, thinking it can decide whether or not to certify a class based on the pleadings. However, courts should be reluctant to certify any class solely on the pleadings. If a party has been denied certification, and can prove that their rights have been substantially impinged upon, failure to hold an evidentiary hearing could result in a subsequent reversal.\(^4\) As the distinguished authors of *The Litigation Handbook on the West Virginia Rules of Civil Procedure* indicate, certification without an evidentiary hearing should be the exception rather than the rule.\(^4\)

### III. The Bad: The Ever-Shrinking Discretion of the Circuit Court in the Certification Process

In West Virginia, appellate review of a circuit court’s order denying certification takes place through two distinct methods: (1) writ of prohibition and (2) direct appeal.\(^4\) Prior to *Rezulin*, a writ of prohibition could be implemented only where certification was granted.\(^4\) However, in *Rezulin*, the West Virginia Supreme Court of Appeals allowed this device to be used where certification was denied.\(^4\) In *Rezulin*, the class filed a writ of prohibition against the Circuit

---


\(^{41}\) *See CLECKLEY, DAVIS, & PALMER, supra* note 3, at 474-75.

\(^{42}\) *Id.*

\(^{43}\) Black’s Law Dictionary defines a writ of prohibition as “1. A law or order that forbids a certain action . . . 2. An extraordinary writ issued by an appellate court to prevent a lower court from exceeding its jurisdiction or to prevent a nonjudicial officer or entity from exercising a power.” *BLACK’S LAW DICTIONARY* 1228 (7th ed. 1999).

\(^{44}\) *See CLECKLEY, DAVIS, & PALMER, supra* note 3, at 449.

\(^{45}\) *See id.* (citing McFoy v. Amerigas, 295 S.E.2d 16 (W. Va. 1982)).

\(^{46}\) *In re W. Va. Rezulin Litig.* v. Hutchinson, 585 S.E.2d 52 (W. Va. 2003). The Court explained its analysis for when a writ of prohibition would be entertained:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be
Court of Raleigh County, which refused to return the consolidated cases to the courts where the actions were individually filed.\textsuperscript{47}

The Supreme Court of Appeals has long held that the party asserting class standing may appeal an order denying certification.\textsuperscript{48} The court recently reaffirmed this holding in \textit{Ways v. Imation Enters. Corp.}\textsuperscript{49} Additionally, in \textit{Love v. Georgia-Pacific Corp.}, the court permitted an interlocutory appeal\textsuperscript{50} from an order denying certification based on the class representative’s request to conduct discovery limited to class certification.\textsuperscript{51}

Allowing an interlocutory appeal in state court is a surprising development since Rule 23 of the West Virginia Rules of Civil Procedure does not expressly permit interlocutory appeals.\textsuperscript{52} West Virginia Rule 23 lacks the provision contained in its federal counterpart which states: “A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification . . . [a]n appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.”\textsuperscript{53} Nevertheless, allowing an interlocutory appeal from the denial of certification is consistent with the court’s liberal views on appealing certification orders. The Supreme Court of Appeals has stated “[w]e have in the past taken a rather liberal view of when [a certification] order is appealable.”\textsuperscript{54}

\textsuperscript{47} Id. at 62 (quoting State ex rel. Hoover v. Berger, 483 S.E.2d 12 (W. Va. 1996).
\textsuperscript{48} Id. at 76. The cases were consolidated for trial pursuant to West Virginia Trial Court Rule 26.01, which states: “The Mass Litigation Panel shall . . . make recommendations to the Chief Justice on the transfer of actions from one circuit to another in order to facilitate any case management or trial methodologies developed by the Panel.” W. VA. TRIAL CT. R. 26.01.
\textsuperscript{50} 589 S.E.2d 36, 39 n.1 (W. Va. 2003).
\textsuperscript{51} An interlocutory appeal is “[a]n appeal that occurs before the trial court's final ruling on the entire case.” BLACK'S LAW DICTIONARY 94 (7th ed. 1999). “Some interlocutory appeals involve legal points necessary to the determination of the case, while others involve collateral orders that are wholly separate from the merits of the action.” Id.
\textsuperscript{52} See W. VA. R. CIV. P. 23.
\textsuperscript{53} FED. R. CIV. P. 23(f).
\textsuperscript{54} Mitchem v. Melton, 277 S.E.2d 895, 900 (W. Va. 1981) (citing Blacksheere v. Blacksheere,
We will now turn from "how" an order for certification is appealed and examine other aspects of the certification process. The denial or grant of certification is the most critical stage in the life of a class action. If a circuit court determines that certification is not appropriate, and denies certification, it has the practical effect of denying relief on the merits to the class. On the other hand, granting certification may force a defendant into settlement negotiations, as many defendants are not willing to risk an adverse jury verdict. Therefore, the importance of appellate review cannot be overstated; however, the scope of review exercised by the appellate court must be limited so it does not substitute its judgment for that of the circuit court. Essentially, the circuit court serves a gate-keeping function in the certification process. It decides whether the proposed class meets the requisites for certification under Rule 23 and in making this critical determination it should receive special deference.

In the West Virginia Supreme Court of Appeals’ recent decision, In re West Virginia Rezulin Litig. v. Hutchison, as well as the Court’s subsequent decision in Love, the Supreme Court of Appeals reversed the circuit court’s determination as to whether certification was appropriate. The reasoning supporting each decision will be examined in turn.

161 S.E. 27 (W. Va. 1931)); see also Parsons v. McCoy, 202 S.E.2d 632 (W. Va. 1973); McDaniels v. Romano, 190 S.E.2d 8 (W. Va. 1972) (reviewing orders setting aside default judgments).

See Aimee G. Mackay, Comment, Appealability Of Class Certification Orders Under Federal Rule Of Civil Procedure 23(f): Toward A Principled Approach, 96 NW. U. L. REV. 755, 798 (2002) (“The class certification order... is the most important decision in a class action case: for the plaintiffs, it means the life or death of their pursuit of their claims; for the defendants, it means a very close line between almost zero liability and so much liability that settlement is the only option.”); see also Martha Neil, New Route for Class Actions, 89 A.B.A. J. 48 (July, 2003).

See Mackay, supra note 55, at 798.

See Appellate Practice Group, Recurring Issues In Consumer And Business Class Action Litigation In Texas, 33 TEX. TECH L. REV. 971, 994 (2002). (“It is conventional wisdom that class action litigation is often won or lost at the certification stage-certification of a class can lead to a substantial settlement, while denial of certification greatly reduces a plaintiff’s incentive to pursue the lawsuit.”); JV Schwan, Capitol Comment 273 - Class Action Lawsuits: We Are All Victims Now, Freedom Works, at http://www.cse.org/processor/printer.php?issue_id=634 (April 3, 2000) (“certification of frivolous classes often forces the defendant to settle, even though they have done nothing wrong... Because of the sheer magnitude of the class, corporations often settle class actions, rather than risk a verdict that puts them into bankruptcy.”).

See Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 433 (4th Cir. 2003) (“[t]he trial court’s] careful analysis of Rule 23’s requirements and its detailed factual findings... reveal no abuse of discretion... [W]e cannot say... at this interlocutory stage that the decision to conditionally certify a class action... constitutes an abuse of discretion, particularly in light of the special deference due trial courts on this issue”) (emphasis added).


Rezulin, 585 S.E.2d at 61; Love, 590 S.E.2d at 680.
A. The Supreme Court of Appeal's Reversal in Rezulin: Abuse of Discretion or Abuse of Power?

Before a class can be certified it must meet all four requirements under 23(a), and at least one of the three requirements under 23(b). If one were to plot the conclusions of the Circuit Court of Raleigh County and the Supreme Court of Appeals on a graph, the coordinates would be polar opposites. The Circuit Court of Raleigh County found that none of the requirements of 23(a) or 23(b) were satisfied. The Supreme Court of Appeals showed absolutely no deference to these findings. It practically reversed all 125 of the Circuit Court's conclusions of law, finding that all of the requirements of 23(a) were met, as well as the requirements of both 23(b)(2) and (b)(3).

In reaching this conclusion, the West Virginia Supreme Court of Appeals employed a two-tiered analysis. First, the Court set forth an abuse of discretion standard to review the circuit court's order denying class certification. Next, it applied a de novo standard of review to the Circuit Court's interpretation of Rule 23 of the West Virginia Rules of Civil Procedure.

Based upon the above test articulated by the supreme court of appeals, it may appear that the circuit court received substantial deference. However, a closer look will show that this is not necessarily true. The circuit court's "interpretation of Rule 23" and its "determination of whether the requisites for a class action are met" are part of a similar inquiry. The requisites for a class action are found within the text of Rule 23. This two-tiered approach implemented by the Supreme Court of Appeals is so flexible it can review virtually any class certification decision de novo.

---

62 See W. VA. R. CIV. P. 23.


64 Rezulin, 585 S.E.2d at 76.

65 Id. at 61.

66 An abuse of discretion standard of review for class certification is appropriate according to most courts and leading commentators. See, e.g., Allison v. Citgo Petroleum Corp. 151 F.3d 402, 407 (5th Cir. 1998) (applying abuse of discretion standard to determine whether certification under 23(b)(2) was appropriate); see also 4 CONTE & NEWBERG, supra note 22, at § 13:62. According to West Virginia case law, an abuse of discretion standard is defined as "when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them." State ex rel. Leung v. Sanders, 584 S.E.2d 203, 209 (W. Va. 2003).


68 Rezulin, 585 S.E.2d at 61.

69 See supra note 2 for the relevant text of W. VA. R. CIV. P. 23.
After reading the following sections it should be clear to the reader that if the supreme court of appeals reviewed the decision of the Circuit Court of Raleigh County with any deference the Circuit Court's order denying certification would have been upheld.

1. Comparing and Contrasting the Supreme Court of Appeal’s Opinion in \textit{Rezulin} with the Findings of the Circuit Court of Raleigh County

Before examining the \textit{Rezulin} decision, it is important to understand the choices the Circuit Court of Raleigh County was forced to make in determining whether certifying a class of \textit{Rezulin} users was appropriate. The supreme court of appeals had not interpreted Rule 23 since its amendment in 1998.\footnote{While many states readily adopted the 1966 version of the federal Rule 23, the West Virginia Court did not feel compelled to change its archaic ways. Indeed, by 1998, the only states still using a variation of the 1938 version of Rule 23 were Georgia, Missouri, North Carolina and West Virginia. \textit{See} 4 CONTE & NEWBERG, \textit{supra} note 22, at \S\ 13:3.}

The former version of West Virginia Rule of Civil Procedure 23 read as follows:

\begin{quote}

a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

\end{quote}


Notice that the 1938 version of Rule 23 is divided into three categories: true, hybrid, and spurious. \"[T]hose falling under the first subparagraph [are] \textit{true class suits}, that is, ones wherein, but for the class action device, the joinder of all interested persons would be essential.\" \textit{LUGAR & SILVERSTEIN, \textit{supra} note 20}, at 196. In other words, suits brought under (a)(1) sought to enforce shared rights among class members, an example of which would be an action by a group of taxpayers against a municipality. \textit{See generally} Callen v. Callen, 83 Pa. D. & C. 212, 215 (Common Pleas Mercer Co. Pa. 1952) (citing Gericke v. Philadelphia, 44 A.2d 233 (Pa. 1945)). The second type, the hybrid class suit, involves a suit where \"the rights of the members of the class are several, but the joint or common interests are replaced by the property affected by the rights involved in the litigation.\" \textit{LUGAR & SILVERSTEIN, \textit{supra} note 20}, at 196. The hybrid suit under former 23(a)(2) could be considered a predecessor of the modern \textit{limited fund} class action under the current version of 23(b)(1)(B). 1 CONTE & NEWBERG, \textit{supra} note 22, at \S\ 1.09. Classic limited fund class actions include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime accident suit, and others. \textit{See} Ortiz v. Fibreboard Corp., 527 U.S. 815, 834-35 (1999). Examples of what would be considered a hybrid class action include claims against specific property, such as trust funds, realty and assets
cuit court was faced with several decisions of first impression for a West Virginia court. It applied existing West Virginia precedent, and, when necessary, chose from a wide-ranging body of applicable law, both state and federal. According to the Supreme Court of Appeals, the Circuit Court of Raleigh County made all of the wrong choices. The supreme court of appeals found error even though the circuit court's findings were substantially similar to those of the California Superior Court and the Federal District Court for the Southern District of an insolvent. See Echols v. Star Loan Co. 274 So. 2d 51, 57 (Ala. 1973) (interpreting ALA. EQUITY R. 31(a)(2), which is identical to the former W. VA. R. CIV. P 23(a)(2)).

Lastly, the spurious class action could be maintained "where the character of the right is several and a common question of law or fact is presented and a common relief is sought." Burks v. Wymer, 307 S.E.2d 647, 649 (W. Va. 1983), superseded by statute as stated in Rezulin, 585 S.E.2d at 64; see also Mitchem, 277 S.E.2d at 902 n.10 (quoting LUGAR & SILVERSTEIN, supra note 20, at 196). A common example of this type of suit would be several purchasers of stock sued to recover money where they had been induced to buy stock by a common fraudulent representation. See Callen, 83 Pa. D. & C. at 215 (citing Independence Shares Corp. v. Deckert, 108 F.2d 51 (3d Cir. 1939)); ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL 9 (1999).

Needless to say, these three categories proved to be difficult to apply with any type of consistency. See ROBERT KLONOFF & EDWARD K.M. BILICH, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION 32-39 (2d. 2000). The three categories often overlapped, making it difficult to determine who was bound by a judgment. See id. The judgments in true and hybrid extended to the class, but the judgment in a spurious action extended only to the parties, and only these parties would be bound by the judgment. See LUGAR & SILVERSTEIN, supra note 20, at 196.

Presumably, the use of subclasses are permitted in West Virginia after Rezulin. See Rezulin, 585 S.E.2d at 73. Subclasses were not permitted under former Rule 23. See Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass'n, 393 S.E.2d 653, 660 (W. Va. 1990) (quoting Mitchem, 277 S.E.2d at 896) ("There is no requirement . . . in our Rule 23 as there is in Rule 23(c)(4) of the Federal Rules of Civil Procedure for the use of subclasses."). In Rezulin, the West Virginia Court seemingly approves the use of subclasses as a management tool. 585 S.E.2d at 73.

In Part III, Sections C and D of the Rezulin opinion, the Supreme Court of Appeals reversed every finding of the Circuit Court of Raleigh County regarding the interpretation of West Virginia Rules of Civil Procedure 23(a) and (b) with one exception discussed later in this note. Rezulin, 585 S.E.2d at 64-76.


The Superior Court of Los Angeles found that common questions of fact or law did not predominate over individual issues since the CLRA claim “would involve individualized inquiry as to whether each class member sustained any damage as a result of the allegedly false advertising.” Delaney, 2003 Cal. App. Unpub. LEXIS 2883, at **29-30. Similarly, under the UCL claim, the inquiry would be whether Rezulin was effective to each member. Id. The other reasons for
of New York—similar cases faced with certifying a class of Rezulin users. It is likely that the decision by the California Superior Court and the Multi District Litigation ("MDL") in New York followed the rationale of the Circuit Court of Raleigh County since the Circuit Court of Raleigh County was the first to deny certification in a Rezulin class action and was the first to have its findings published in an online legal database.\(^74\) In fact, the MDL Court referenced the decision of the Circuit Court of Raleigh County, stating "It therefore is not surprising that all relevant . . . court decisions have rejected class certification in products liability cases."\(^75\) "Nor . . . is it surprising that . . . California and West Virginia [state courts have] declined to certify classes in other Rezulin cases."\(^76\)

---

\(^{73}\) Similarly, in September 2002, the United States District Court for the Southern District of New York denied certification under federal rules 23(b)(2) and 23(b)(3). See In re Rezulin Prods. Liab. Litig., 210 F.R.D. 61, 75 (S.D.N.Y. 2002). In this action, hundreds of individual product liability actions were consolidated for trial and transferred to this forum. \(\text{Id.}\) at 62. Judge Lewis A. Kaplan denied certification of a class consisting of "all persons who ingested Rezulin and their spouses, and a subclass of asymptomatic Rezulin users who have not yet manifested physical injury." \(\text{Id.}\) The class sought certification under 23(b)(2) and (b)(3) and the subclass sought relief in the form of medical monitoring under (b)(2). \(\text{Id.}\) Judge Kaplan denied certification under (b)(3) because he found that the factors listed within (b)(3) weigh heavily against certification. \(\text{Id.}\) at 66. The Court noted that some of the plaintiffs alleged physical injury while others alleged enhanced risk of injury. \(\text{Id.}\) Each plaintiff who alleged physical injury would have to prove causation on his or her injury since the circumstances surrounding each plaintiff were unique. \(\text{Id.}\) Also, the Court found that the alleged deceptive practices implemented by the defendant would require a similar inquiry into individual issues. \(\text{Id.}\) at 68. Therefore, the Court found that the New Jersey Consumer Protection Act was not applicable to the class. \(\text{Id.}\) The Court also denied medical monitoring relief for the subclass under (b)(2). \(\text{Id.}\) at 74. However, the Court stated that even if the subclass qualified for treatment under 23(b)(2), the plaintiffs failed to satisfy the requirements of (b)(2) since the class was not cohesive. \(\text{Id.}\) at 75.


\(^{75}\) In re Rezulin Prods. Liab. Litig., 210 F.R.D. at 65-66.

\(^{76}\) \(\text{Id.}\) at 66.
In its order denying certification, the circuit court found that none of the requisites of 23(a) were met. Perhaps the findings of the Circuit Court of Raleigh County would have received more deference by the Supreme Court of Appeals had it adopted the approach taken by the Federal MDL Court of assuming without deciding 23(a) was satisfied and instead focused on why certification under 23(b) was not appropriate. The circuit court's denial "across the board" seemed to weaken its overall argument against certification. Moreover, the circuit court's strict interpretation of 23(a)'s requirements might have been thought to frustrate the goals of the class action device. In this Note, it is only contended that the circuit court acted within its discretion in denying certification under 23(a)(1), the numerosity requirement. Accordingly, 23(a)(1) will be the only factor under 23(a) that will be discussed.

Rule 23(a)(1) of the West Virginia Rules of Civil Procedure states: (a) "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." In Rezulin, the Circuit Court of Raleigh County interpreted 23(a)(1)'s requirement of "impracticability of joining all members" as not requiring impossibility, only difficulty or inconvenience. The circuit court utilized a rather mechanical test to see whether the requirement of numerosity was satisfied. It evaluated the following factors:

a. Size (no minimum number, must be evaluated on a case-by-case basis);

b. Geographic dispersion of the class;

c. Facts of a specific case;

---

78 See In re Rezulin Prods. Liab. Litig., 210 F.R.D. at 66 ("In this case, the Court assumes without deciding that the requirements of Rule 23(a) are satisfied.").
79 See AMERICAN LAW INSTITUTE, REPORT, MARCH 31, 1987: PRELIMINARY STUDY OF COMPLEX LITIGATION 34-48 (giving a strict interpretation to the requisites for certification frustrates the use of class actions as vehicles to deter corporate wrongdoing).
80 W. VA. R. CIV. P. 23(a)(1).
82 Id.
d. Several members of the putative class reside outside the court's jurisdiction;

e. Where members are poor, uneducated, or otherwise not inclined or able to bring individual actions.\(^8\)

In applying these factors to the proposed class, the circuit court concluded that the classes consisting of between 2,000 and 5,000 plaintiffs did not show that the proposed class was "so numerous that joinder of all members is impracticable."\(^3\) On appeal, the West Virginia Supreme Court of Appeals did not rely on the factors listed above.\(^4\) Additionally, the Supreme Court of Appeals refused to adopt a "magic minimum number" that would qualify a class for certification under 23(a)(1).\(^5\) But, the court indicated it would certify a very small number under the right circumstances, citing with approval actions where as few as seventeen members made up the class.\(^6\)

In reversing the Circuit Court of Raleigh County, the Supreme Court of Appeals made clear that the identity or even an approximate number of other class members are not needed for the determination of numerosity.\(^7\) This interpretation of 23(a)(1) creates a very liberal standard for determining the numerosity requirement. Newberg states, "[c]ourts have denied class motions for lack of numerosity when the plaintiff has failed to provide facts or demonstrate circumstances that would provide support for a reasonable estimate of class size."\(^8\)

Whether the plaintiffs in Rezulin presented a reasonable estimate of class size is debatable. The Supreme Court of Appeals appears to camouflage

---

\(^{83}\) Id. Although the circuit court does not cite the source of these factors, they are similar to those listed in Newberg:

Apart from class size, factors relevant to the joinder impracticability issue include judicial economy arising from avoidance of a multiplicity of actions, geographic dispersement of class members, size of individual claims, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members.

1 CONTE & NEWBERG, supra note 22, at § 3:6.


\(^{86}\) Id. at 65.

\(^{87}\) Id.

\(^{88}\) Id. at 66.

this in its opinion. The court states that the estimated class size is 5,000 and that 2,000 are represented by counsel, but it indicates in a footnote, "[i]t is unclear whether lawsuits have been filed on behalf of these individuals, or whether the plaintiff’s attorneys actually represent these individuals or simply know that these individuals wish to assert claims against the defendants." Based upon this footnote, it is reasonable to assume that the Supreme Court of Appeals merely took the plaintiff’s word at face value regarding the approximate number of class members and did not require counsel to demonstrate facts or circumstances to provide a reasonable estimate.

It was not unreasonable, and certainly not an abuse of discretion for the Circuit Court of Raleigh County to require a reasonable estimate of the proposed class because other courts have held when class size is unclear it is not an abuse of discretion to deny certification. It seems in prior cases the Supreme Court of Appeals gave more deference to the circuit court in determining whether the numerosity requirement of Rule 23 was satisfied. For example, in 1964, the court decided Robertson v. Hatcher, in which it announced the same abuse of discretion standard of review as it did in Rezulin: "whether the persons constituting a class are ‘so numerous as to make it impracticable to bring them all before the court’ depends upon the circumstances in each case, and whether to permit a class action on this basis rests in the sound discretion of the trial court."

In Robertson, taxpayers, certain officials, and others filed an action against the Circuit Clerks of Kanawha County, Wirt County, and Doddridge County, seeking to determine the constitutionality of 1963 W. Va. Acts 158. This Act purported to "divide the state into senatorial districts and to apportion membership of the house of delegates and congressional districts." The circuit court determined that the class failed to meet the numerosity requirement and required the plaintiffs to amend the complaint to include all thirteen circuit clerks that were affected by the Act. On appeal, the Supreme Court of Appeals upheld this determination, finding that the circuit court acted within its discretion in determining that the members of the class were not so numerous as to make it impracticable to bring them before the court.

---

90 Rezulin, 585 S.E.2d at 66 n.10.
91 See, e.g., Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1033 (5th Cir. 1981) (sug- suggesting when the size of a class is unclear, a court has not abused its discretion in holding the class failed to establish numerosity).
93 Id. at 679 (quoting LUGAR & SILVERSTEIN, supra note 20, at 194).
94 Id. at 677-80.
95 Id.
96 Id. at 680.
97 Id.
While the Rezulin court's lenient interpretation of the numerosity requirement may allow many actions to be certified that would have otherwise failed, it seems that the supreme court of appeals has merely substituted its judgment for that of the circuit court.

It is maintained in this Note that the supreme court of appeals has articulated a standard of review that is too flexible. When reviewing whether certification in a particular case is appropriate, the supreme court of appeals can exercise a de novo standard of review virtually whenever it desires. In Rezulin, the supreme court of appeals set forth an abuse of discretion standard but noted that the circuit court's discretion "must be exercised in the context of the appropriate rules of procedure."\(^{98}\) In the Rezulin opinion, the Supreme Court of Appeals indicates that it is not overturning the Circuit Court of Raleigh County by stating, "the circuit court was called upon to apply and interpret Rule 23 of the West Virginia Rules of Civil Procedure."\(^{99}\) "As we stated in . . . Keesecker v. Bird, "An interpretation of the West Virginia Rules of Civil Procedure presents a question of law subject to a de novo review."\(^{100}\)

Therefore, as long as the Supreme Court of Appeals exercises a de novo review in determining whether the requisites of Rule 23 are satisfied, circuit court orders granting or denying certification will really not be receiving much deference on appellate review and certainly not a review employing a "true" abuse of discretion approach.

There is one final thought on the West Virginia Supreme Court's interpretation of numerosity in Rezulin. Since the West Virginia Supreme Court of Appeals adopted such a liberal interpretation of the numerosity requirement, it seems if enough putative members either decide not to join a certified class or exercise the right to opt out of a (b)(3) class, the circuit court could at a later time decertify the class. Nowhere in its opinion in Rezulin did the West Virginia Supreme Court suggest that once the numerosity requirement was deemed satisfied it would continue to be satisfied for the duration of the action.

As stated previously, all four requirements of 23(a) must be satisfied and at least one of the requirements of 23(b).\(^{101}\) By denying relief under all four elements of 23(a) and all three elements of 23(b), it appears that the circuit court abused its discretion in the Rezulin litigation. But, even assuming that the circuit court abused its discretion in denying relief under all four factors of 23(a), if the class does not satisfy any one of the three subsections of 23(b), the class must not be certified.\(^{102}\) We shall now examine the analysis of the Circuit Court of Raleigh County and the Supreme Court of Appeals under 23(b).

---


\(^{99}\) Id.

\(^{100}\) Id. (citations omitted).

\(^{101}\) See id. at 64.

\(^{102}\) See W. VA. R. CIV. P. 23.
b. Conflicting Interpretations of West Virginia Rule of Civil Procedure 23(b)

The Rezulin class sought certification under (b)(3) for personal injury claims, under (b)(1) and (b)(3) for punitive damages, and (b)(1)(A) and (b)(2) for injunctive relief in the form of a medical monitoring program. Unquestionably, in an equitable action under (b)(2), monetary relief cannot predominate over injunctive relief. The Advisory Committee notes for Federal Rule 23(b)(2) state that, "[t]he subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages." Since punitive damages were sought under (b)(1) and (b)(3), non-monetary relief could not possibly predominate over monetary relief. Therefore, the circuit court concluded that by the express language of the Advisory Committee, the action for damages could not proceed under (b)(2).

Additionally, the circuit court found that the class lacked the requisite cohesiveness to qualify for class treatment under (b)(2). Since the question of cohesiveness was a question of first impression for a West Virginia court, the Circuit Court of Raleigh County was forced to choose between two different approaches, the approach taken by the Third Circuit in Barnes v. American Tobacco Co., or the approach taken by the Ninth Circuit in Walters v. Reno. The circuit court chose the Barnes approach, which requires cohesiveness in (b)(2) classes. But, whether the West Virginia Rule 23(b)(2) requires cohesiveness, as well as whether the West Virginia Consumer Protection Act is a suitable vehicle for class treatment, are questions of law appropriate for a de novo review by the Supreme Court of Appeals. But, in this case, the Supreme Court of Appeals should not have reached the issue of cohesiveness because at
the time the Circuit Court of Raleigh County considered certification the action was predominated by monetary relief sought under (b)(1) and (b)(3); therefore, treatment under (b)(2) was not appropriate.

Notice that on appeal to the West Virginia Supreme Court of Appeals the plaintiffs did not challenge the circuit court's denial of the (b)(1) claim. This omission of the (b)(1) claim was a very clever procedural maneuver. In fact, it may have given the class a "second bite at the apple." By discarding the (b)(1) claim requesting punitive damages, the (b)(2) requirement discussed above, that "monetary relief cannot predominate over injunctive relief," became easier to satisfy. If the (b)(1) claim had not been omitted on appeal it is likely that the Supreme Court of Appeals would have been forced to deny relief under (b)(2), which would prohibit the use of a medical monitoring class.

The Circuit Court of Raleigh County's denial of the (b)(1) claim seems to be the only finding that was not overturned on appeal. Presumably, the circuit court's interpretation of 23(b)(1) is an accurate interpretation because the Supreme Court of Appeals did not feel compelled to discuss it, and its interpretation is in accord with other jurisdictions. This brings the discussion to the (b)(3) claim. The circuit court found that individual issues prevented the application of (b)(3) just as the United States District Court for the Southern District of New York and the California Superior Court found when faced with certifying a class of Rezulin users. If the circuit court had granted certification under (b)(3), it would have been an abuse of its discretion. The granting of certification under (b)(3) would have been a drastic extension of medical monitoring relief under existing West Virginia case law. The leading case on medical monitoring relief in West Virginia is Bower v. Westinghouse Elec. Corp. Bower contains a six-part test that must be met before a plaintiff can obtain medical monitoring relief. But, extending Bower

112 In re W. Va. Rezulin Litig., 2001 WL 1818442, at *19. The circuit court found that relief could not be granted under (b)(1)(A) in an action for damages because it applies only to actions seeking injunctive or declaratory relief. Id.

113 See In re W. Va. Rezulin Litig. v. Hutchison, 585 S.E.2d 52, 70 (W. Va. 2003). "The plaintiffs do not assert a position as to whether they meet the qualifications of Rule 23(b)(1), and we therefore do not discuss this part of the rule." Id.

114 See id.

115 See, e.g., Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1338 (9th Cir. 1976).

116 See supra notes 72-76 and accompanying text.


118 Bower, 522 S.E.2d at 426. In order to sustain a claim for medical monitoring expenses under West Virginia law, the plaintiff must prove that

(1) he or she has, relative to the general population, been significantly exposed;
to the facts presented before the Court in Rezulin was a bit radical. Bower was a case dealing with the accidental exposure of six persons to toxic chemicals contained in a two-acre, 42 feet deep, cullet pile containing debris from the manufacture of light bulbs,\(^{119}\) it was not a prescription drug class action involving thousands of potential litigants. The Circuit Court of Raleigh County recognized this distinction, stating in its findings:

> Allowing a medical monitoring remedy in a case involving a prescription drug has enormous implications, and class certification of such a claim has even greater implications.... If any court should authorize such an extension of the law, it should be a policy-making appellate court rather than a trial court.\(^{120}\)

As the circuit court indicates, the extension of Bower was better suited for the Supreme Court of Appeals than the circuit court. In Rezulin, the Supreme Court of Appeals took the opportunity to extend Bower to the realm of class action litigation.\(^ {121}\)

The Supreme Court of Appeals found that the first two elements of Bower, (1) significant exposure in comparison with the general population, and (2) to a proven hazardous substance, common among the entire class.\(^ {122}\) It also observed that the class would probably succeed in demonstrating that the defendant's tortious conduct was directed toward the public as a whole, thereby satisfying the third factor of Bower.\(^ {123}\) However, it conceded that whether the final three elements of Bower are met is less clear and stated only that the evidence indicates that the class will "have an increased risk of contracting a serious disease, and that the increased risk makes it reasonably necessary for the plaintiffs

(2) to a proven hazardous substance;

(3) through the tortious conduct of the defendant;

(4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease;

(5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and

(6) monitoring procedures exist that make the early detection of a disease possible.

\(^{119}\) Id.

\(^{120}\) Id. at 426-27.


\(^{122}\) See Rezulin, 585 S.E.2d at 72-73.

\(^{123}\) Id.
to undergo periodic medical examinations using existing monitoring procedures, different from what would have been required of the plaintiffs in the absence of their use of Rezulin.\textsuperscript{124}

Interestingly, the supreme court of appeals did not refer to the sixth element of \textit{Bower}, which is that "monitoring procedures exist that make detection of a disease possible."\textsuperscript{125} The supreme court of appeals concluded its application of \textit{Bower} by extending it to the \textit{Rezulin} class action, stating, "because all plaintiffs in the proposed class took Rezulin, the plaintiffs assert that all members of the class are at risk for an idiosyncratic reaction and injury."\textsuperscript{126}

This is a much lower threshold than set forth in \textit{Bower}. Under the \textit{Rezulin} court's analysis, a class member is not required to demonstrate that the medication or drug was the proximate cause of his or her injury. All that must be shown at the certification stage is an increased risk of future harm to trigger medical monitoring relief.

After examining the Circuit Court of Raleigh County's conclusions of law and the opinion by the Supreme Court of Appeals, several things are apparent. Perhaps the most striking is the contrast in the tenor of the two opinions. The anti-certification stance taken by the circuit court and the pro-certification position taken by the Supreme Court of Appeals. It seems odd that two separate courts can reach such drastically different results.

2. Result-Oriented Decision Making or Sound Judicial Reasoning?

In reversing the Circuit Court of Raleigh County, the Supreme Court of Appeals states that "[t]he circuit court, in its order denying class certification, appears to have relied almost exclusively on federal cases interpreting Rule 23 of the \textit{Federal Rules of Civil Procedure} - and denying class certification - in drug or medical device actions."\textsuperscript{127} However, in a recent dissenting opinion, Justice Davis observed that,

Due to the similarities between our Rules of Civil Procedure and the Federal Rules, we often look to decisions of the Federal Courts interpreting their rules as persuasive authority on how to apply our own rules . . . . [W]e follow our usual practice of giving substantial weight to federal cases in determining the meaning and scope of our rules of civil procedure.\textsuperscript{128}

\begin{footnotes}
\item[124] \textit{Id}.
\item[125] \textit{See supra} note 118 and accompanying text.
\item[126] \textit{Rezulin}, 585 S.E.2d at 73.
\item[127] \textit{Id}. at 61.
\item[128] Love v. Georgia-Pacific Corporation, 590 S.E.2d 677, 681 n.2 (W. Va. 2003) (Davis, J.,
It is difficult to reconcile this quote with the Court’s opinion in *Rezulin*. A possible explanation of the Supreme Court of Appeals’ aversion to federal cases interpreting Rule 23 is that the *Rezulin* decision was result-oriented. There is no denying class action litigation is a very political topic. The Republican party is constantly supporting legislation aimed at tort reform. We live in an era where the class action system is under constant attack by conservatives, President Bush, and even a few Democrats. It is ironic that during this time period the West Virginia Supreme Court of Appeals proclaims the strengths of the class action device. However, there are many factors suggesting that *Rezulin* was not the product of partisan politics, but an example of a court using the class action device to its full potential, as a “vehicle for correcting wrongs committed by large-scale enterprise upon individual consumers.”

---


The introduction to this Bill speaks volumes as to its desired result:

> Class action lawsuits in America have raised a number of grave concerns. Currently, our rules foster a game where attorneys lump thousands and sometimes millions of speculative claims in one class action and race to any available State courthouse in hopes of a rubber-stamped settlement. It is a part of our civil justice system that has gone wild. Over the past 10 years State court class action filings have increased 1,000 percent. This creates an enormous economic drain on small businesses, big industries and insurers, and provides windfall attorney fees while individual class members usually receive a small fraction of any settlement award.

*Id.*

130 In October 2003, the GOP and its Democratic supporters failed in its attempt to pass the Class Action Reform Act, a bill with the primary goal of pushing class-action lawsuits into the federal court system and away from state courts, which are typically more generous to plaintiffs. Charles Hurt, *Democrats Kill Bill On Class-Action Reform*, THE WASHINGTON TIMES, October 22, 2003, at A1, available at [http://www.washingtontimes.com/national/20031022-115704-7759r.htm](http://www.washingtontimes.com/national/20031022-115704-7759r.htm).

131 See Robert Pear, *In a Shift, Bush Moves to Block Medical Suits*, N.Y. TIMES, July 24, 2004, at A1, available at LEXIS, News Library, N.Y. Times File (discussing how “[t]he Bush administration has been going to court to block lawsuits by consumers who say they have been injured by prescription drugs and medical devices”); see also Robert Dreyfuss, *George W.’s Compassion*, 10 AMERICAN PROSPECT 46 (September 1, 1999), at [http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=4507](http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=4507) (discussing political contributions from big tobacco and how “no one has more at stake in tort reform than the tobacco industry”).

132 Senate Majority Leader Bill Frist, R-Tenn, was successful in getting support from Democrats such as Sen. Tom Carper, D-Del. See *Senate Democrats Kill Lawsuit Reform*, NEWSMAX.COM (October 23, 2003), at [http://www.newsmax.com/archives/articles/2003/10/22/170257.shtml](http://www.newsmax.com/archives/articles/2003/10/22/170257.shtml).

It seems that the West Virginia Supreme Court of Appeals is interested in making companies change the way they do business and in deterring future wrongdoing. The West Virginia Court stood united in *Rezulin*, with no concurring or dissenting opinions. This unusual unity, especially for the West Virginia Court, signals that it is firmly convinced that the *Rezulin* case is the ideal medical monitoring, products liability action, and it is worthy of class action treatment. It remains to be seen what effect, if any, the *Rezulin* decision will have on small businesses, big industries and insurers in West Virginia.

Although *Rezulin* was a huge step forward for consumers in West Virginia, it came at a diminishment of the discretion of the Circuit Court, and unfortunately, it was not the last diminishment.

B. The Bad Aspects of *Love v. Georgia-Pacific*

The Supreme Court of Appeal’s decision in *Love* is “bad” in two respects. First, the Supreme Court of Appeals did not give the Circuit Court of Fayette County the deference that it should have. Second, the Supreme Court of Appeals did not define what is “reasonable” regarding discovery related to the issue of class certification. Each will be discussed in turn.

In *Love v. Georgia-Pacific*, a class action commenced under the Wage Payment and Collection Act, the class representative sought discovery limited to class certification issues and the Circuit Court of Fayette County denied this request. After sitting forth an abuse of discretion standard of review, the Supreme Court of Appeals in a *per curiam* opinion, proceeded to reverse the circuit court’s denial of certification. It held that “where issues related to class certification are present, reasonable discovery related to class certification issues is appropriate, particularly where the pleadings and record do

---


137 *Love*, 590 S.E.2d at 679.

138 “[A]ny per curiam decision, because it represents the decision of a majority of the court, is ‘as much a part of the common law of this jurisdiction as any other opinion rendered by this Court.’” *Walker v. Doe*, 558 S.E.2d 290, 295-96 (W. Va. 2001) (quoting *Harmon v. Fayette County Bd. of Educ.*, 516 S.E.2d 748, 761 n.1 (W. Va. 1999) (McGraw, J., dissenting)). The Court in *Doe* further stated “per curiam opinions are generally entitled to the same weight as the syllabus of a decision in stating the law.” *Id.*

139 *Love*, 590 S.E.2d at 681.
not sufficiently indicate the presence or absence of the requisite facts to warrant an initial determination of class action status.”

In support of this statement the court resorted to its 1982 decision in Burks v. Wymer. Burks was decided under the former version of Rule 23 of the West Virginia Rules of Civil Procedure. Love revived the Burks statement that “an exploration beyond the pleadings is essential to make an informed judgment on the propriety of a proposed spurious class action.” Applying this framework to the facts presented in the case, the Love court found that the class representative would be “severely hampered in her ability to address and to meet her burden for class certification under Rule 23” if not allowed to conduct discovery on the issue of certification. It remanded the action back to the Circuit Court of Fayette County and mandated that the circuit court permit discovery on class certification issues.

In her dissent, Justice Davis, who had recused herself from the Rezulin decision, explained how the Circuit Court of Fayette County did not abuse its discretion in denying the plaintiffs an opportunity to conduct discovery. She noted that the class representative failed to “adequately protect the interests of the class as required by 23(a)(4)” by not advancing the litigation in a four and one-half year period. Justice Davis explained that this circumstance alone was sufficient grounds to deny class certification.

The standard of review in determining viability of class actions claims has been a part of West Virginia’s jurisprudence for half a century. The standard is best summarized in the 1981 case of Mitchem v. Melton as follows: “Whether the requisites for a class action exist rests within the sound discretion of the trial court.” After announcing it in both Love and Rezulin, the Court

---

140 Id. (emphasis added).
141 307 S.E.2d 647, 654 (W. Va. 1982).
142 See supra note 70 for a summary of the prior version of Rule 23.
143 Love, 590 S.E.2d at 681(quot ing Burks, 307 S.E.2d at 654).
144 Id.
145 Id.
146 In re W. Va. Rezulin Litig. v. Hutchison, 585 S.E.2d 52 (W. Va. 2003). Apparently this recusal was because her spouse, Scott Segal, was one of class counsel. For further details see Supreme Court Gives Drug Case Class Action Status, THE CHARLESTON GAZETTE, July 4, 2003, at 6A, available on LEXIS, News Library, The Charleston Gazette File.
147 Love, 590 S.E.2d at 681-82 (Davis, J., dissenting).
148 Id. at 682 (Davis, J., dissenting).
149 Id. (Davis, J., dissenting).
failed in both cases to adhere to the standard of review. Therefore, as Justice Davis points out, the circuit court did not act improperly in denying class certification under the circumstances presented in *Love*.  

Additionally, the court in *Love* failed to set clear boundaries for discovery on the issue of certification. To clarify, in class actions there are two types of discovery: (1) discovery on the merits, and (2) discovery on information relevant to certification issues.  

Part II of this Note considered *Rezulin's* impact on discovery relating to the merits of a class action. This portion addresses discovery related to certification issues.  

The dissent in *Love* noted several important issues that the majority failed to address. In her dissent, Justice Davis pointed out that discovery on the issue of certification is not automatic, and that the decision of whether or not to allow class certification discovery lies “within the sound discretion of the circuit court.” Generally, discovery on certification issues is not permitted of putative class members. Instead, discovery on information relevant to certification issues is directed at the class representatives or named parties. Furthermore, this type of discovery is normally limited to specific areas of inquiry by the court, such as the adequacy of a proposed class representative, numerosity, etc.  

In the event that a circuit court concludes that discovery on the issue of certification is desirable, it should follow the guidelines recommended in the *Manual for Complex Litigation, Third*, which encourages courts to aid in devising a specific discovery plan, cautioning that “[d]iscovery relat[ed] to class [certification] issues may overlap substantially with merits discovery.”  

However, drawing a line between “class” and “merits” issues is often difficult, if not impossible. The concern with this overlap is that it may allow a “peak at the other player’s cards,” resulting in an early settlement of a claim or

---

153 *Love*, 590 S.E.2d at 681-82 (Davis, J., dissenting).
154 See *FEDERAL JUDICIAL CENTER*, *supra* note 13, at 215.
155 See *supra* Part II.
156 *Love*, 590 S.E.2d at 681-82 (Davis, J. dissenting).
157 *Id.* at 682 (Davis, J. dissenting).
158 See *FEDERAL JUDICIAL CENTER*, *supra* note 13, at 215-16.
159 *Id.*
160 *Id.*
161 *Id.*
162 See generally *KLONOFF & BILICH*, *supra* note 70, at 316-22.
even a dismissal. Defendants will normally be the ones opposing discovery on class certification because potentially damaging documents dealing with the merits of the plaintiffs' claims may be obtained. This is likely to occur in West Virginia since the Court of Appeals did not state what is "reasonable" with discovery related to certification. Circuit courts may allow plaintiffs to get a look into the merits prior to certification by giving the term "reasonable" a broad definition. But, it should be remembered that discovery on the issue of certification can benefit the defense as much as, or more than, the plaintiff because the defense may uncover facts that completely destroy the plaintiff's case.

Nevertheless, it should also be remembered that if discovery on the issue of certification is permitted, it should be a two-way street. "[B]oth sides should be permitted to support their position for or against certification by engaging in discovery." As Part II of this Note suggests, the Supreme Court of Appeals has succeeded in its endeavor to set clear guidelines for the circuit courts in certification hearings. The Court should strive to define "reasonableness" with more clarity so discovery related to certification issues is equally clear.

C. Things Could Always be Worse

Even after the decision in Rezulin, part of the West Virginia Supreme Court of Appeals still feels the circuit courts has too much discretion in class certification proceedings. In Ways v. Imation Corporation, the Supreme Court of Appeals upheld the order of the Circuit Court of Jefferson County, denying class certification to a group of former employees alleging breach of contract and race, gender, and age discrimination in violation of the West Virginia Human Rights Act. See Geoffrey E. Parmer, What "Erin Brockovich" Failed To Tell You About The Realities Of Class Action Litigation, 57 J. Disp. Resol. 19 (2002). Another author suggests that plaintiffs should draft requests for production in a manner that merits discovery must be included in the responses. See Susan Getzendanner, Class Certification Discovery, 15 Litig. 25, Fall, 1988; Parmer, supra, at 22 ("Courts have consistently held that the issue of what constitutes merits discovery versus class certification discovery is not clear-cut, and documents inevitably fall into both categories.").

See KLONOFF, supra note 70, at 98-99; see also Parmer, supra note 163, at 19. Another author suggests that plaintiffs should draft requests for production in a manner that merits discovery must be included in the responses. See Susan Getzendanner, Class Certification Discovery, 15 Litig. 25, Fall, 1988; Parmer, supra note 163, at 22 ("Courts have consistently held that the issue of what constitutes merits discovery versus class certification discovery is not clear-cut, and documents inevitably fall into both categories.").

See, e.g., CLECKLEY, DAVIS & PALMER, supra note 3, at 474.

Id.


Id. at 47.
While the majority in this *per curiam* opinion found that the circuit court was correct in its determination, that the class did not meet Rule 23(a)'s requirements of commonality and typicality, Justice McGraw disagreed. In his dissent he thought that the threshold of commonality under 23(a)(2) should be even lower than the Court set forth in *Rezulin* and that the circuit court erred in denying certification.

Whether Justice McGraw is correct in urging the court to adopt a lower threshold for commonality and typicality is reserved for another day. Suffice it to say he desired to reverse the circuit court's order denying certification. Thankfully, the majority did not allow the circuit court's discretion to be injured any further by overturning it on another occasion. The majority in *Ways* found that the Circuit Court of Jefferson County correctly concluded that individualized evidence relating to the existence of a valid contract of continued employment raised issues that were not appropriate for treatment under (a)(2) and (a)(3).

**D. The Big Picture**

After examining the recent decisions of the West Virginia Supreme Court of Appeals, a general observation is that circuit courts are not receiving enough deference as to whether class certification is appropriate. Although the court of appeals makes a valid argument that it is interpreting the law *de novo* in *Rezulin*, its failure to show the Circuit Court of Raleigh County any deference could be an abuse of power. This reasoning is supported by the *Love* court's refusal to show any deference to the Circuit Court of Fayette County, despite the fact that the class representative failed to adequately protect the interests of the class. Subsequently in *Ways*, the supreme court of appeals showed the Circuit Court of Jefferson County more discretion than it previously had in *Love* and *Rezulin*. The court should continue this route in the future and not undermine the significant role the circuit court plays in the certification process by overturning reasonable and rational decisions.

**IV. THE AMBIGUOUS: A SECOND LOOK AT REZULIN**

On the face of *Rezulin* it appears that the Supreme Court of Appeals has dually certified the class of Rezulin plaintiffs under both 23(b)(2) and (b)(3).

---


170 *See id.* (McGraw, J., dissenting).

171 *Id.* at 47.

172 *See supra* Part III.B.

173 Dual certification is strongly discouraged by virtually every commentator, as well as courts. Most suits that qualify as class actions under Rule 23(b)(1) or Rule 23(b)(2),
The problem with the appearance of dual certification should be evident after reading the *Federal Practice and Procedure* treatise, which suggests that:

will also qualify under the more comprehensive demands of 23(b)(3). When either Rule 23(b)(1) or Rule 23(b)(2) is applicable, however, Rule 23(b)(3) should not be used; in order to avoid unnecessary inconsistencies and compromises in future litigation.

CLECKLEY, DAVIS & PALMER, *supra* note 3, at 458 (citations omitted).

When a class action may qualify under Rule 23(b)(3) as well as 23(b)(1) or (b)(2), it is necessary to specify the particular provision of the rule under which it is certified. See *Federal Judicial Center, supra* note 13, at 217. Members of a (b)(3) class are entitled to notice and an opportunity to opt out. See *id*. Rules 23(b)(1) and (b)(2) do not mandate such notice and opportunity. See *id*.

It is not surprising that starting from a common base, a proposed class action may often qualify under two or all three functional class categories, which considerably overlap. Of the three subdivisions, Rule 23(b)(3) is the most comprehensive. Some commentators have suggested that the Rule 23(b)(3) type encompasses all class actions, and that Rule 23(b)(1) and (b)(2) class actions represent specialized categories where class actions have been found particularly appropriate. See 2 CONTE & NEWBERG, *supra* note 22, at § 4:1.

It is not usual for a case to qualify as more than one of the three types of class actions listed under Rule 23(b)(3). See 5 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 23.40[2] (Matthew Bender 3d ed. 2004). If a choice exists, a mandatory class action is preferable because there is not risk that individual members will opt out of the class and pursue separate litigation that might prejudice other class members or the defendant. See *id* at ¶ 23.40[3].

The origination of the objection to dual certification under (b)(2) and (b)(3) can be traced back to *Van Gemert v. Boeing Co.*, 259 F. Supp. 125 (S.D.N.Y. 1966), which was decided shortly after the new version of Rule 23 replaced the older version of the Rule with its “true, hybrid, and spurious” classifications. See *supra* note 70 and accompanying text for a discussion of old Rule 23. Addressing the issue of certification under 23(b), the *Van Gemert* court stated

[i]t seems apparent that virtually every class action that meets the requirements of 23(b)(1) or 23(b)(2) will also meet the less severe requirements of 23(b)(3). . . . To apply 23(b)(3) [where certification under (b)(1) or (b)(2) was appropriate] would run the serious risk of negating the very purpose for which those rules were promulgated.


The *Van Gemert* court also looked to the 1966 Advisory Committee notes for guidance and concluded that (b)(3) was not designed for use where either (b)(1) or (b)(2) was applicable. *Id*. The District Court for the Middle District of Florida cited *Van Gemert*, and stated,

It may be argued that the class action in this case could have been maintained under Rule 23(b)(3) and that may be so. However, as noted above, this suit was clearly maintainable under other sections of the rule. ‘When such options are available, the Court should treat the action as one under Rule 23(b)(1) or (b)(2) instead of under (b)(3) in order 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.’

Although it should make little difference which portion of Rule 23(b) applies to a particular case, the overlap does have significance when both Rule 23(b)(2) and Rule 23(b)(3) are applicable because the type of notice required . . . and the ability of a class member to exclude himself from the judgment will depend on which subdivision is deemed controlling. If the court determines that both provisions apply, then it should treat the suit as having been brought under Rule 23(b)(2) so that all the class members will be bound. *To hold otherwise would allow the members to utilize the opting out provision in subdivision (c)(2),* which in some cases would thwart the objectives of representative suits under Rule 23(b)(2).\(^{174}\)

Although the supreme court of appeals did certify two classes of Rezulin users under two separate provisions of Rule 23, a medical monitoring class under 23(b)(2) and a personal injury class under 23(b)(3), it certified two distinct, separate classes.\(^ {175}\) This is a technically a "hybrid certification,"\(^ {176}\) with an injunctive and declaratory relief first stage without the right to opt-out\(^ {177}\) and a second relief stage under 23(b)(3), in which class members have opt-out rights.\(^ {178}\) The problem is that one cannot derive this information from the court's opinion.\(^ {179}\)

Specifically in regards to the 23(b)(2) certification, the court stated, "We find that under Rule 23(b)(2), after liability has been established, a court may exercise its equitable powers to establish and administer a court-supervised medical monitoring program to oversee and direct medical surveillance, and provide for medical examinations and testing of members of a class."\(^ {180}\) Regarding 23(b)(3) certification it stated, "[a]s we perceive the existing record, a class action appears to be a superior method to any other method for expeditiously litigating the claims of the parties."\(^ {181}\) "The plaintiffs have therefore met

\(^ {174}\) 7A WRIGHT, supra note 104, at § 1775 (emphasis added).
\(^ {176}\) Hybrid certification occurs where equitable claims for relief are certified under (b)(2) and damage claims are evaluated under (b)(3). See 2 CONTE & NEWBERG, supra note 22, at § 4:14.
\(^ {177}\) "In contrast to Rule 23(b)(3) classes, Rule 23 does not mandate notice in (b)(2) actions that a class has been certified and does not give class members a right to "opt out" of the class." KلونOFF, supra note 70, at 68 (1999).
\(^ {179}\) This information became apparent after speaking to lawyers, both for the plaintiffs and the defendants, involved in the *Rezulin* litigation.
\(^ {181}\) *Id.* at 76.
the requirements of Rule 23(b)(3), and the circuit court erred in holding otherwise.”

The unintended result of this language may result in Rezulin being interpreted by other courts or attorneys in two ways:

1. permitting (b)(2) class members the right to opt-out to pursue separate litigation, a result never intended by the Advisory Committee on FRCP 23, or

2. requiring costly notice to (b)(2) class members that could potentially cripple many (b)(2) classes.

Generally, classes under 23(b)(1) or (b)(2) are not subject to notice and opt-out requirements, whereas (b)(3) class members are entitled to “the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” The notice must “advise each member that the court will exclude the member from the class if the member so requests by a specified date.” If Rezulin is interpreted wrongly to require notice to (b)(2) classes, or opt-out rights, class actions under this provision will be severely impaired.

By not setting forth any guidelines for either notice or opt-out rights, the West Virginia Court created confusion. The next time the Court considers issues related to class certification it must clarify the following: (1) In re West Virginia Rezulin Cases does not authorize dual certification, (2) that notice is generally not required in (b)(2) classes, and (3) that (b)(2) class members are not permitted to opt-out absent court approval. The Court cannot reasonably expect lawyers to simply know these points after reading the ambiguous Rezulin opinion.

A partial “quick fix” would occur if the Court adopts the recently amended version of Federal Rule of Civil Procedure 23. The Advisory Committee Notes for the new Rule 23 provide that if a 23(b)(3) class is certified in conjunction with a (b)(2) class the notice requirements must conform with 23(c)(2)(B). However, the uncertainty concerning the right to opt-out of

182 Id.

183 A leading commentator in class actions states, “(b)(1) and (b)(2) do not by their terms allow for opt-outs . . . when only non-monetary relief is sought . . . nonetheless, courts generally hold that trial courts have discretion under Rule 23(d)(5) to permit opt outs.” KLONOFF, supra note 70, at 126-36.

184 FED. R. CIV. P. 23(c)(2).

185 Id.

186 The New Federal Rule 23(c), effective December 1, 2003 provides:
(b)(2) classes would remain. Therefore, the Court needs to address the ambiguities it created in *Rezulin* regardless of whether it amends Rule 23 in the future. This point should not be read as an endorsement for West Virginia’s adoption of

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1)(A) When a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

*Id.*
the amended federal rule. Although the amended Rule has many advantages, it may give courts too much involvement in the settlement process.  

V. CONCLUSION

As an old song goes, "You've come a long way baby . . . [but] You've still got a way to go."  Although the song was not about West Virginia's class action jurisprudence, it certainly applies. After studying the evolution of Rule 23 in West Virginia, it is apparent that the court has improved West Virginia's class action device, but it is still far from what it should be.

But, "what it should be" is very subjective. A perfect model to one may be grossly inadequate to another. Nevertheless, if the court follows the critique set forth in this Note, continues to set forth clear, concise standards as pointed out in Part II, strives to exercise the appropriate scope of appellate review as discussed in Part III, and refrains from creating confusion, as demonstrated in Part IV, the result should be a more functional and satisfactory Rule 23.

Brad Dorsey*

---


* J.D. May, 2004. West Virginia University College of Law. B.A, Bluefield State College, 2001. The author would like to thank his family, especially his wife Melissa, for all of her love and support, and his two beautiful daughters, Julia and Camille, for making each day bright and adventurous. I would also like to thank Michelle Elmore for her comments and suggestions, but most of all for her friendship throughout law school.