

## [Class Certification Denied in YAZ MDL](#)

Posted on May 16, 2011 by [Sean Wajert](#)

The federal judge managing the multidistrict litigation over the birth control pill Yaz last week declined to certify a proposed national class of users allegedly harmed by the contraceptive, and struck the class action allegations from the complaint. *In re: Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation*, No. 3:09-md-02100 (S.D. Ill.).

In the [opinion](#), Judge Herndon noted that named plaintiff Plaisance was a 44-year-old citizen of the State of Louisiana who was prescribed YAZ in May of 2006 by her physician. During the summer of 2006, plaintiff was hospitalized due to a deep vein thrombosis ("DVT") in her left leg. She alleged that the DVT, as well as other adverse effects, were caused by her ingestion of YAZ. Plaintiff sought class certification of a nationwide class of YAZ purchasers who contracted DVT, but in the alternative proposed separate state-wide classes.

Plaintiff asserted claims for negligence, strict product liability, breach of express warranty, breach of implied warranty, fraudulent misrepresentation, fraudulent concealment, negligent misrepresentation, medical monitoring, and fraud and deceit.

Plaintiff maintained that the putative nationwide and state wide classes met the requirements of Rule 23(a) and 23(b)(3). In addition, plaintiff contended that the unitary application of the law of Louisiana was appropriate and somehow resolved issues related to the application of the substantive laws of multiple jurisdictions.

Here, the Court's analysis began and ended with Rule 23(b)(3); it was "evident" to the court that individual questions of law and fact predominated, and therefore the case was not manageable as a nationwide or statewide class action. Rule 23(b)(3)'s predominance and manageability requirements also precluded any proposed "issue" certification under Rule 23(c)(4).

To satisfy the requirements of Rule 23(b)(3), a plaintiff must show that common questions of factor law predominate over individual questions and that class treatment is superior to other available methods of adjudication. Fed. R. Civ. P. 23(b)(3). Assessing the predominance factor requires consideration of the substantive elements of a plaintiff's claims and the proof necessary to establish those elements. See *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 673-74, 677-78 (7th Cir. 2001); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-19 (7th Cir. 2002). In addition, a court must consider issues pertaining to manageability and choice of law.

On that last point, this action was transferred from the United States District Court for the Eastern District of Louisiana. Therefore, Louisiana choice of law rules governed the complaint. See *Chang v. Baxter Healthcare Corp.*, 599 F.3d 728, 732 (7th Cir. 2010). Under Louisiana's codified choice of law rules, the substantive law of each plaintiff's home state would govern the

merits of the case. Accordingly, the laws of all fifty states plus the District of Columbia would be applicable to the putative nationwide class members' claims. Amongst the states, there are differences in the law of product liability as well as in the applicable theories of recovery and their subsidiary concepts. These differences, said the court, "are not insignificant." See e.g., *Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300-1301 (7th Cir. 1995). Indeed, "such differences have led [the Seventh Circuit] to hold that other warranty, fraud, or products-liability suits may not proceed as nationwide classes"). In *re Bridgestone/Firestone, Inc.*, 288 F.3d at 1015. See also *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir.2001); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir.2001); In *re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir.1995). In the class action context differences in state law cannot be swept away by electing to apply the law of a single state to all class members' claims. See *Id.* at 1017-1020. Although the unitary application of a single state's law might promote efficiency, it would also constitute an unacceptable violation of principles of federalism. Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court.

The court went on to correctly note that mass product liability suits are rarely sustainable as class actions. Establishing the requisite elements of product liability claims sounding in strict liability, negligence, warranty, and/or fraud generally requires fact intensive inquiries unique to each plaintiff (such as questions related to causation, injury, affirmative defenses, and damages). In the instant case, almost every element of the asserted claims would have required highly individualized factual inquiries unique not only to each class member but also to each class member's prescribing physician. For example, establishing causation would require (1) an examination of each class member's medical history, including pre-existing conditions and use of other medications; (2) an evaluation of potential alternate causes for the alleged injury; and (3) an assessment of individualized issues pertaining to each class member's prescriber, including how the doctor balances the risks and benefits of the medicine for that particular patient, the particular doctor's prescribing practices, the doctor's knowledge about the subject drug, and the doctor's sources of information with regard to the subject drug. Establishing elements of the fraud and warranty claims would also turn on facts unique to each plaintiff, particularly with regard to questions of materiality and reliance.

On the (c)(4) issue, the court recognized that Seventh Circuit jurisprudence indicates that Rule 23(b)(3)'s requirements of predominance and manageability are applicable to "issue" certification under Rule 23(c)(4). There is disagreement amongst district courts with regard to whether, under Rule 23(c)(4), the predominance evaluation is a limited inquiry, focusing only on the individual issue for which class treatment is sought, or requires consideration of the cause of action as a whole. See e.g., *In re Fedex Ground Package System, Inc., Employment Practices Litigation*, 2010 WL 1652863, \*1-2 (N.D. Ind. Apr. 21, 2010); *In re General Motors Corp. Dex-Cool Prods.*, 241 F.R.D. 305, 313-314 (S.D.Ill.2007). The Fifth Circuit Court of Appeals in particular has been critical of district courts that fail to consider the case as a whole when evaluating predominance under Rule 23(c)(4). See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n. 21 (5th Cir. 1996).

Here, the court felt no need to choose a side, because in the instant case, the putative common issues, including matters such as whether the subject drugs were defective or whether these defendants failed to give adequate warnings, were enmeshed with the same individual issues of law and fact as affected certification of the putative class as a whole. The allegedly common issues had subsidiary concepts (such as causation, duty of care, and reliance) which would present questions that can only be answered by considering facts that are unique to each putative class member and her prescribing physician.

In addition, many – if not all – of the proposed common issues could not be certified without triggering the Seventh Amendment concerns discussed in *Rhone-Poulenc Rorer*. See *Rhone-Poulenc Rorer*, 51 F.3d at 1303. A trial court must divide issues between separate trials in such a way that the same issue is reexamined by different juries. Here, multiple juries in follow-up trials would have to examine such issues as comparative negligence and proximate cause after a first jury examined the alleged negligence.