

Missouri Class Actions and the Merchandising Practices Act

**Trial Skills Seminar Course
April 30, 2010**

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General Principles: The Class Action is a Procedural Device Only

“Rule 52.08 is procedural and cannot alter substantive law.”

Charles v. Spradling, 524 S.W.2d 820, 824 (Mo. banc 1975); see also Mo. Const. art. V, § 5 (procedural rules “shall not change substantive rights”).

General Principles: Federal Precedent is Persuasive

“As Missouri Rule 52.08 is identical to Rule 23, Federal Rules of Civil Procedure, we may use federal precedent.”

Ralph v. Am. Fam. Mut. Ins. Co., 809 S.W.2d 173, 174 (Mo. App. E.D. 1991); see also *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 858 n.2 (Mo. banc 2008).

General Principles: The Party Seeking Certification Bears the Burden of Proof

The moving party bears the burden of proving that the requirements of class certification are met.

Green v. Fred Weber, Inc., 254 S.W.3d 874, 878 (Mo. banc 2008);
Coleman v. Watt, 40 F.3d 255, 258-59 (8th Cir. 1994)

General Principles: The Case is an Individual Case Only Until and Unless a Class is Certified

- “Until the class is certified, the action is one between [an individual plaintiff] and the defendants.” *Rolo v. City Investing Co.*, 155 F.3d 644, 659 (3d Cir. 1998), abrogated on other grounds, *Forbes v. Eagleson*, 228 F.3d 471 (3d Cir. 2000).
- *Koehr v. Emmons*, 55 S.W.3d 859, 864 (Mo. Ct. App. 2001) (reversing class certification where named plaintiff did not have a viable claim); *Vervaecke v. Chiles, Heider & Co.*, 578 F.2d 713, 719-20 (8th Cir. 1978) (affirming summary judgment for defendants prior to addressing issue of class certification; named plaintiff who lacked a meritorious claim could not adequately represent the putative class).

General Principles: The Requirements of the Class Action Rule Implicate Due Process

- Because the class action is an “exception to the traditional rule that litigation is conducted by and on behalf of individual named parties only,” “[t]he various provisions of [the class action rule] have been carefully drafted... to assure that due process is maintained.”

Saey v. Comp. USA, 174 F.R.D. 448, 451 (E.D. Mo. 1997); *Beatty v. Metro. St. Louis Sewer Dist.*, 914 S.W.2d 791, 795 (Mo. banc 1995); *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982).

General Principles: The Court is Required to Conduct a Rigorous Analysis as to Whether the Requirements for Class Certification are Proven

Missouri and federal courts require a rigorous analysis of the requirements for class certification before any class may be certified.

Amchem Prods, Inc. v. Windsor, 521 U.S. 591, 614 (1997);
Koger v. Hartford Life Ins. Co., 28 S.W.3d 405, 410 (Mo. Ct. App. 2000)



"If you close your eyes and make an allegation, someday it might come true."

General Principles: Class Certification Findings Must be Made by a Preponderance of the Evidence

- “Allegations alone are not enough, nor is mere conjecture.”
- Class certification findings must be made by a preponderance of the evidence

Fingal v. MDSC Corp., No. 22032-00742, at 11 n.11 (Mo. Cir. Ct. June 15, 2006) (Riley J.); see also *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2009)

Rule 52.08 and Sec. 407.025.3 Elements

(a) Prerequisites to a Class Action

- (1) Class is so numerous that joinder is impracticable
- (2) Common questions of law or fact
- (3) Claims of name plaintiff typical of the class
- (4) Class representative will fairly and adequately protect interests of the class

Rule 52.08 and Sec. 407.025.3 Prerequisites

(a) (1) Numerosity

- Generally, class members in the range of 40-50 have been found to suffice.

See Esler v. Northrup Corp., 86 F.R.D. 20, 34 (W.D. Mo. 1979)

Rule 52.08 and Sec. 407.025.3

Prerequisites

(a) (2) Commonality

- “[T]he nature of the evidence that will suffice to resolve a question determines whether the question is common or individual.”
- “If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question.”

Craft v. Philip Morris Cos., Inc., 190 S.W.3d 368, 382 (Mo. App. E.D. 2005) (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005)).

Rule 52.08 and Sec. 407.025.3 Prerequisites

(a) (3) Typicality

- The named plaintiff must “possess the same interest and suffer the same injury as the class members.” *Harris v. Union Elec. Co.*, 766 S.W.2d 80, 86 n.10 (Mo. banc 1989)
- Limits the class claims to those “fairly encompassed by the named plaintiff’s claims.” *General Tel. Co. v. EEOC*, 446 U.S. 318, 330 (1980)

Rule 52.08 and Sec. 407.025.3 Prerequisites

(a) (4) Adequacy of Representation

- Focuses on whether conflicts of interest exist between the named plaintiffs and the class they seek to represent

State ex rel. Union Planters Bank v. Kendrick, 142 S.W.3d 729, 735 (Mo. banc. 2004)

Rule 52.08 and Sec. 407.025.3 (b) Elements

(b) Class Actions Maintainable

1. Risk of inconsistent adjudications (e.g., limited fund); or
2. Party opposing has acted on grounds applicable to the class making injunctive or declaratory relief appropriate (civil rights); or
3. Common questions predominate over individual issues, and a class action is a superior method of fair and efficient adjudication, which includes consideration of :
 - A) The interest of individuals in controlling litigation;
 - B) Extent and nature of other existing litigation by class members;
 - C) Desirability of concentrating litigation in one forum; and
 - D) Difficulties likely to be encountered in the management of cases

Rule 52.08 (b) and Sec. 407.025.3 Elements: Predominance

- The Rule 23(b)(3) predominance analysis focuses “on the legal or factual questions that qualify each class member’s case as a genuine controversy... and tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997)
- If significant elements of a claim or defense require individualized proof from each class member, class certification is inappropriate. *Id.*
- To decide whether class certification is appropriate, the Court must examine “the claims, defenses, relevant facts, and applicable substantive law” and then consider how a trial on the merits would be conducted. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996)

The Class Definition Requirement

- Rule and statute do not explicitly mention the need for a proper class definition but “such a requirement clearly underlies each of the mandatory elements for certification.”
- “[I]f a class is not properly defined, the circuit court must deny certification.”

State ex rel. Coca-Cola Co. v. Nixon, 249 S.W.3d 855, 861 (Mo. banc 2008)

The Class Definition May Not Be Overbroad

“A class definition that encompasses more than a relatively small number of uninjured putative members is overly broad and improper.”

State ex rel. Coca-Cola Co. v. Nixon, 249 S.W.3d 855, 861 (Mo. banc 2008)

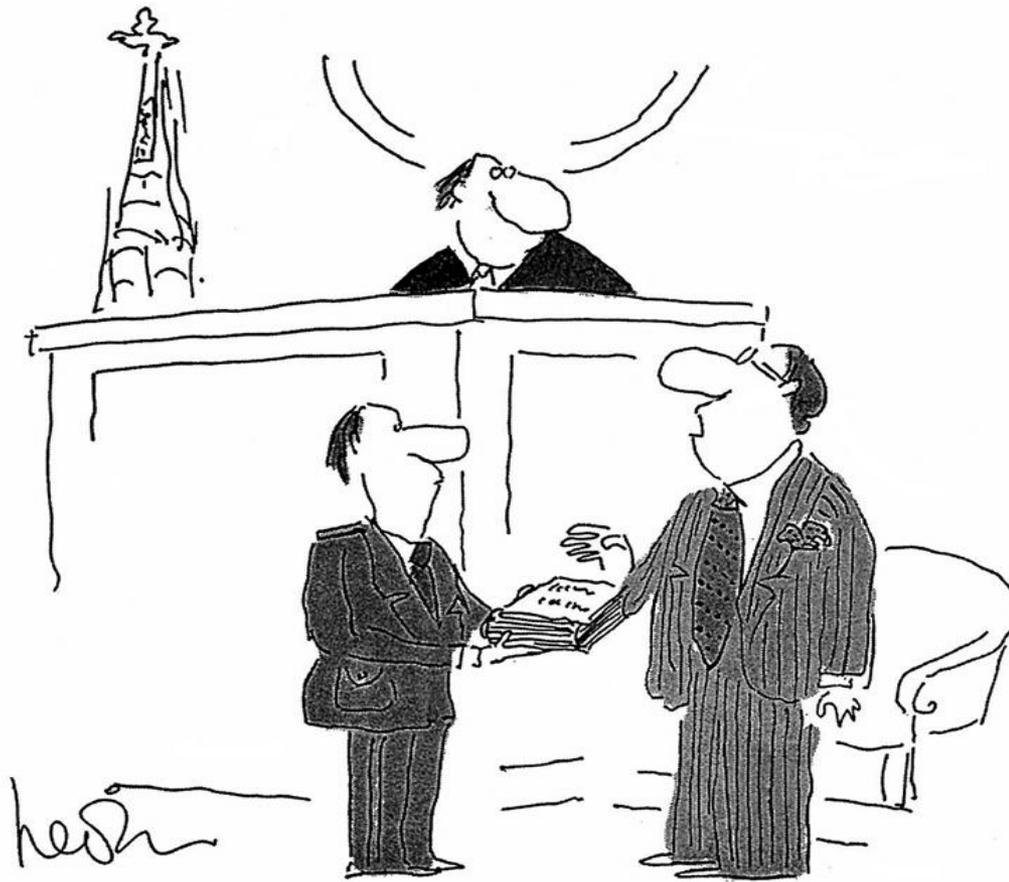
State ex rel Coca-Cola

- **2008 Missouri Supreme Court MPA Case**
- **Plaintiff alleged Coca-Cola deceived consumers into believing that fountain Diet Coke is the same product as bottled Diet Coke**
- **Plaintiff alleged that she and others would not have purchased fountain Diet Coke had they known it contains saccharin**

Coca-Cola (cont'd)

- **Proposed class definition: “All individuals who purchased fountain diet Coke in the State of Missouri...”**
- **Court found that many consumers did not care if Diet Coke contained saccharin, and so these consumers did not suffer injury**
- **Narrowing class definition to include only those who would not have bought Diet Coke had they known it contained saccharin would render the class indefinite**
- **Class definition “must be based on objective, rather than on subjective, criteria” (like or dislike of saccharin)**

Class Certification and the Use of Experts



"Is this really necessary, Your Honor? I'm an expert."

A Court Must Rigorously Analyze Expert Testimony Offered in Support of Class Certification

- A court's obligation to rigorously analyze evidence "extends to expert testimony." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008).
- Failing to scrutinize an expert's methodology amounts to a "delegation of judicial power to the plaintiff, who can obtain class certification just by hiring a competent expert." *West v. Prudential Sec.*, 282 F.3d 935, 938 (7th Cir. 2002).

MMPA Requires A Causal Connection Between Alleged Misconduct And Plaintiff's Loss

“Any person who purchases or leases merchandise primarily for personal, family, or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 407.020, may bring a private civil action . . . to recover actual damages.”

Mo. Rev. Stat. § 407.025(1) (emphasis added).

MMPA Requires Causal Connection Between Alleged Misconduct And Plaintiff's Loss

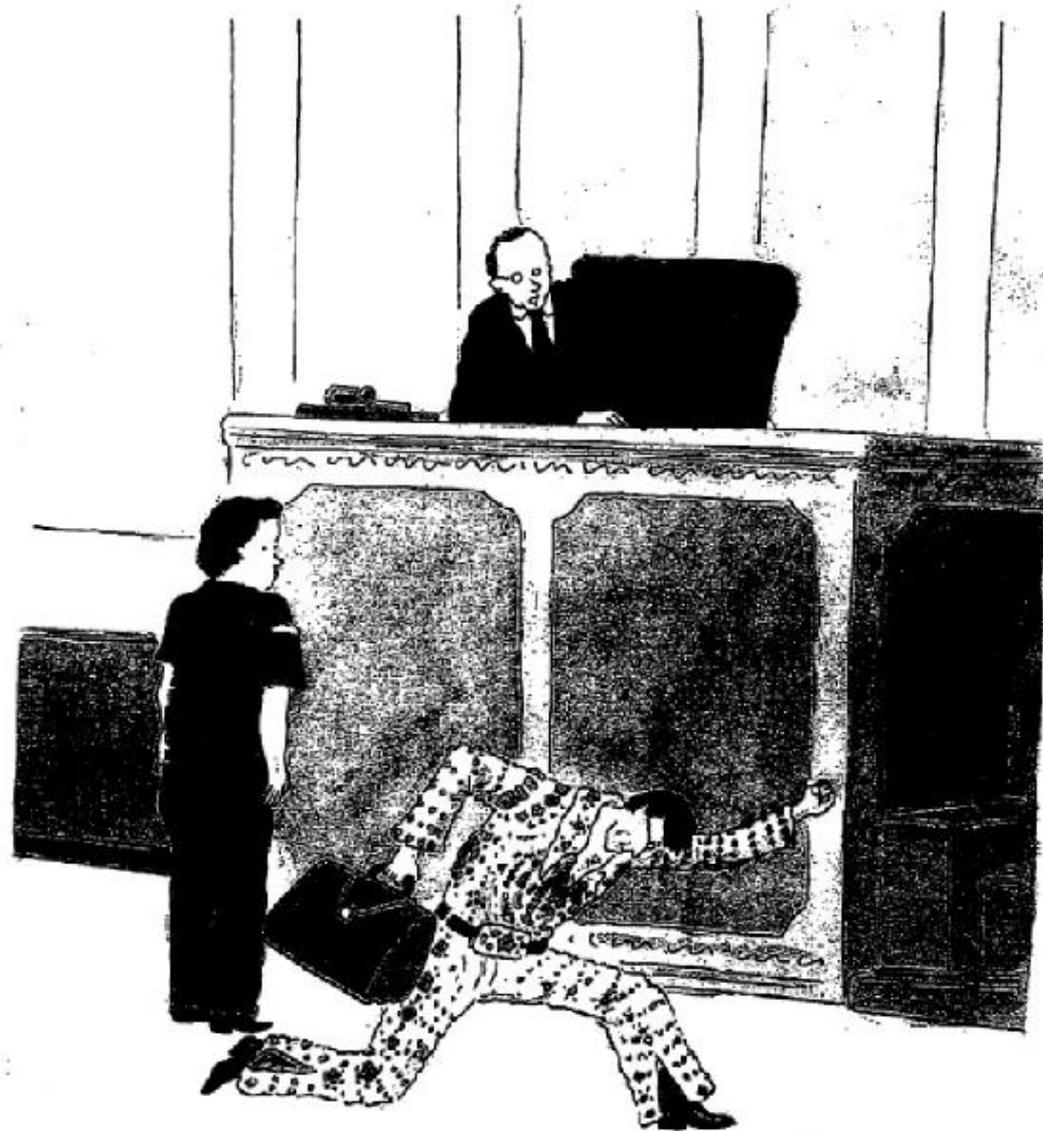
“The plain language of the MMPA demands a causal connection between the ascertainable loss and the unfair or deceptive merchandising practice.”

***Owen v. Gen. Motors Corp.*, 533 F.3d 913, 922 (8th Cir. 2008)
(affirming summary judgment in favor of defendant when plaintiffs failed to submit evidence that they suffered an ascertainable loss as a result of defendant's alleged conduct)**

Timing of Class Certification Discovery

- “Discovery relevant only to the merits delays the certification decision and may ultimately be unnecessary. Courts commonly bifurcate discovery between certification issues and those related to the merits of the allegations.”

Manual for Complex Litigation (Fourth) (2004) § 21.14



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