A PRACTICAL FRAMEWORK FOR CLASS ACTION LITIGATION

(The Plaintiff's Perspective)

"SURVIVING CLASS ACTION JEOPARDY"
ABA NATIONAL INSTITUTE ON CLASS ACTIONS
OCTOBER 24, 2003 and NOVEMBER 7, 2003
SAN FRANCISCO, CA and WASHINGTON, DC

by

Russ M. Herman and Stephen J. Herman
Herman, Mathis, Casey, Kitchens & Gerel, LLP
820 O'Keefe Avenue
New Orleans, LA 70113
Telephone: (504) 581-4892
Fax No. (504) 561-6024

The *Allison*[1] case, decided in 1998, appeared to be the death-knell for class actions in the Fifth Circuit. The suit was a racial discrimination case brought under Title VII on behalf of African-American employees of the Citgo Petroleum complex in Lake Charles, Louisiana. The court denied certification under Rule 23(b)(2) because claims for monetary relief were found to predominate over claims for injunctive relief. The court similarly denied certification under Rule 23(b)(3) because individual issues were found to predominate over common issues. Partial certification of the disparate impact claim was rejected due to Seventh Amendment concerns. And practitioners were left wondering: If you can't certify a racial discrimination suit, what can you certify?

Upon closer examination, however, *Allison* offers a way of looking at Rule 23, based not on esoteric conceptions of what might be defined as "equitable" or "predominant" or "superior", but upon practical considerations of the way in which complex litigation can be managed within the procedural advantages and safeguards provided by the class action rule.[2] Whether you agree or disagree with the outcome in *Allison,* the court provides a significant amount of guidance in its articulation of the test to be employed in determining whether "injunctive" relief predominates over "monetary" relief within the context of Rule 23(b)(2): Can the relief "be awarded without requiring a specific or time-consuming inquiry into the varying circumstances and merits of each class member's individual case" and is "capable of calculation by means of objective standards and not dependent in any significant way upon the intangible, subjective differences of each class member's circumstances," or will it "require additional hearings to resolve the disparate merits of each individual's case"[3]?

The above inquiry, (which we refer to generically herein as "the *Allison* test"), provides a useful framework for all class actions. Because whether you are talking about the "predominance" of injunctive relief under Rule 23(b)(2), or the "predominance" of common issues under Rule 23(b)(3), or "coherence", or "manageability", or "superiority", what it all boils down to, in most cases, is convincing the court that the class action will conserve, rather than burden, judicial time and resources.

This is not to say that the class action device cannot be used effectively where additional hearings relating to individualized issues might be required. Indeed, *Allison* itself suggests that at least some such cases might be appropriate for class treatment under Rule 23(b)(3). (And, of course, in some jurisdictions, *Allison* has been outright rejected.[4]) Yet, more often than not, a judge is not going to want to certify a class where the court believes that hundreds or thousands of mini-trials will be necessary.

From a litigation standpoint, many of the issues that arise – e.g. class definition issues, choice-of-law issues, Seventh Amendment issues, etc. – can be viewed within this framework. The issue of "reliance", for example, is an issue precisely because it has the potential to require a specific or time-consuming inquiry to resolve the merits of each individual's case.

Furthermore, it is helpful to know, from a case-administration standpoint, whether you are litigating a case that meets the *Allision* test. If you have a case that meets the *Allison* test – i.e. a classmember can sit at home and do absolutely nothing, and at the end of the case, if successful, receive a check in the mail, (and/or become the beneficiary of some type of injunctive or declaratory relief) – then you can treat that litigation as essentially one case. If, by contrast, you have a case with a definable yet unidentified class of plaintiffs and/or unliquidated damage claims – i.e. a classmember would be required to submit a proof of claim form or some other evidence in order to share in the recovery – then you essentially need to treat each plaintiff's claim as an individual case, and the action as essentially a consolidation or aggregation of numerous separate cases.

Understanding the differences between these two types of cases is not only important to estimating the likelihood of class certification, but also serves as an important guide to the way in which files are organized, clients are retained, steering committee and other co-counsel arrangements are structured, and settlement is negotiated with the defendant or defendants.

While *Allison* was predictably followed by a string of cases rejecting class certification on various grounds,[5] the Fifth Circuit recently reversed a district court's denial of class certification in a racial discrimination case that satisfied the *Allison* test. *See In re: Monumental Life Insurance Company Industrial Life Ins. Lit.,* No. 02-30540 (5th Cir. Aug. 13, 2003). Adopting the practical approach taken in *Allison,* the court refused to engage in a theoretical discussion about whether the relief sought was "legal" or "equitable" in nature, but rather, sought to determine whether the relief owed to each classmember could be calculated according to standardized formulas, objectively derived from the defendants' own business records, without the necessity for subjective inquiries or other individualized determinations.[6] Such an approach is even supported by the U.S. Supreme Court's *Great West*[7] decision, generally considered somewhat of an esoteric exposition on the theoretical and historical difference between "legal" and "equitable" restitution. The majority in that case notes that back-pay is traditionally awarded in Title VII cases, not because it is a truly "equitable" remedy, but because it is easily awarded **together with** injunctive or other equitable relief.[8] Nevertheless, and in any event, the *Allison* test provides a helpful framework for evaluating, organizing, and prosecuting the class action case.

CLASS-WIDE RELIEF VS. INDIVIDUALIZED RELIEF
(and the Difference Between Legal Entitlement and Eligibility)

One way to frame the action as one that fits the *Allison* test is to focus on the distinction between class-wide relief and individualized relief. While the nature of such relief is obvious in the (b)(2) class seeking a declaratory judgment and/or a traditional mandatory or prohibitory injunction, the payment of money may also be in the nature of class-wide relief when there is, for example, a claim for disgorgement of ill-gotten profits or for the establishment of a court-supervised medical monitoring fund.

There is an important distinction in such cases, for example, between the Named Plaintiff's class-wide claim for the establishment of a single, unitary, equitable, common, court-supervised medical monitoring program, and the subsequent determination as to whether the Named Plaintiff or any other class member might be eligible to participate in or receive particular benefits from the program, once established. The first question relates to the **legal entitlement** of the class as a whole to the class-wide remedy; the second is simply a question of the **eligibility** of particular class members to participate, which can be determined by physicians or other qualified trustees or administrators of the program. Neither the Named Plaintiff nor any member of the class has the right to make a claim for medical monitoring **against the defendant.** The only claim that the Named Plaintiff or any other member of the class will have is the right to apply for participation to receive a test or other procedure **from the fund.** There are, consequently, no individual issues to be adjudicated in the adversarial, trial setting, between the plaintiff class and the defendant. The elements of causation, damage, or affirmative defenses are therefore only relevant to the claims of the **class as a whole.**

Then, once the class-wide remedy has been established on a class-wide basis, "individual claims may be processed by a special master or by a committee of counsel appointed by the court. The drain on judicial resources is thus reduced, and the processing of claims may be simplified because the lesser standard of proof may be applied without jeopardizing defendant's due process rights, the defendant having been given the full opportunity to challenge damages on a class basis at trial." Newberg & Conte, *Newberg on Class Actions* (3rd ed. 1992) §10.12.

In the medical monitoring context, the establishment and administration of the court-supervised program would be analogous to an employee benefit plan under ERISA,[9] with the defendants acting as the settlors, the class as the defined group of eligible participants, and the court as the trustee. *See, e.g., Petito v. A.H. Robins,* 750 So.2d 103, 107 (Fla. App. 3 Dist. 1999), *rev. denied,* 780 So.2d 912 (Fla. 2001) (outlining the procedure for establishment and administration of court-supervised medical monitoring program); *Borst v. Chevron,* 36 F.3d 1308, 1323-1324 (5th Cir. 1994) (no right to jury trial in claim for benefits by ERISA participant or beneficiary); *Pegram v. Herdrich,* 530 U.S. 211, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000) (recognizing the common practice of ERISA plan administrators making "mixed" determinations of eligibility and treatment through treating physicians).

A similar analysis can be applied to the establishment and administration of a constructive trust over proceeds derived from the disgorgement of ill-gotten gains.

THE CLASS DEFINITION

In legal terms, the class definition should be precise, objective, and presently ascertainable; it should not include subjective criteria, nor predicate membership in the class on the merits of the case. *Manual for Complex Litigation, Third* (1995) §30.14.[10]

In functional terms, the class definition serves two primary roles: (i) allows class members who may be affected by the outcome to "opt out", intervene, or take other action to protect their rights; and, (ii) defines the parties for whom a final judgment on the merits will have *res judicata* effect.

The practical test, therefore, is: If you are sitting at home in your living room, and you receive a copy of the notice in the mail, and you look at the class definition, can you tell whether you are a member of the class?

Followed by: If you are a judge in Green Bay, Wisconsin, and it's five years down the road, and someone brings a new lawsuit against the same defendant, will you be able to determine whether the plaintiff was a classmember, whose claims are potentially barred by the previous litigation?

Two examples of class definitions which have been rejected are:

- All individuals who consumed diet Coke from the fountain, **deceived by the marketing practices employed by the Coca-Cola Company** into **believing** that fountain Diet Coke does not contain saccharin.[11]

  – How could the court, without conducting an individualized proceeding for each potential classmember, determine who is or is not a member of the class?

- All present and future claimants for disability benefits who have not had a hearing held within a **reasonable time** and/or who have not have a decision rendered within a **reasonable time** of the hearing date.[12]

  – How do you know what is "reasonable"?

Often, plaintiff's counsel will use the class definition to avoid allegations of "claim splitting". A court may determine, for example, that a class action seeking restitution for the cost of a defective product under a breach of warranty theory will serve as a bar to the litigation of personal injury claims arising from the defect under principles of compulsory joinder and *res judicata.* (Other "claim splitting" issues affecting the adequacy of representation will be discussed *infra.*) The proponent of the class, therefore, may choose to exclude from the class definition those persons who have suffered personal injury, or who are making claims for personal injury, in order to avoid such a challenge.[13]

Class definitions also frequently include: (i) the residency or citizenship of a state, the United States, or some other geographical location; (ii) applicable dates; and, (iii) the exclusion of employees, officers, and directors of the defendants and their subsidiaries.

Again, these issues can be considered within the framework of the *Allison* test. Excluding claims for personal injury damages avoids the need for individualized hearings on causation and damages. Limiting the class to residents of the State of Massachusetts, for example, simplifies the state law choice-of-law issues, and makes the trial of a single case more manageable. Limiting the class to certain dates can be used to avoid potential statute of limitations issues that might require an individualized proceeding to determine when a classmember knew or should have known of his or her cause of action.

Defining the class with distinct time periods and geographical locations also serves to convey a sense of manageability. Compare, for example, the following alternative class definitions:

A. All customers of the Greater Detroit Hardware Association.

B. All residents of the State of Michigan who purchased goods from the Greater Detroit Hardware Association in the State of Michigan between January 17, 2001, and [the date of certification].

Even if, as a practical matter, 99% of the goods purchased from the Greater Detroit Hardware Association were purchased in the State of Michigan after January 17, 2001, the second class seems a lot more cohesive and manageable.

Several courts, and many practitioners, have seized upon the idea that the class definition should be narrowly tailored to define those people, and only those people, entitled to relief. The problem with this approach is that it encourages class definitions for which membership in the class is dependent upon the merits of the case, (e.g. all female employees of ABC Corp. who were intentionally exposed to a hostile workplace), while providing largely illusory protections from a Due Process point of view.

From a practical standpoint, there is generally no prejudice to either the plaintiffs or to the defendants from having an over-inclusive class. The class definition simply determines who is **bound by the judgment**; it doesn't determine who is ultimately **entitled to relief**.

From a plaintiff's perspective: If you don't have a viable cause of action to assert, or if you don't have the desire or the ability to partake in injunctive or other class-wide benefits, what is the harm in having that (largely theoretical) claim barred by *res judicata*? And from the defendant's perspective: If a classmember cannot either increase the amount of damages, (because his or her claim has no value), nor avail himself or herself of the injunctive or declaratory relief, what is the harm in having that (largely phantom) classmember included?

Several recent courts appear to have taken this approach, at least within the context of (b)(2) classes. *See, e.g., In re: Monumental Life, supra,* slip op., pp.8-9 (dismissing the district court's observation that many proposed class members would not benefit from injunctive relief and indicating that it is only necessary for the injunctive relief to benefit "at least some class members"); *In re: West Virginia Rezulin Litigation,* 2003 WL 21518104 (W.Va. July 3, 2003) ("a circuit court may not deny a class certification motion merely because some members of the class have not suffered an injury or loss, or because there are members who may not want to participate in the class action").

Nevertheless, so long as this remains a sticking point, it is the plaintiff counsel's responsibility to attempt to define a class of those persons entitled to recover, with objectively ascertainable criteria, not dependent upon the merits of the case.

CHOICE-OF-LAW

When a party seeks to certify a multi-state class, that party generally has the burden to present an analysis of how choice-of-law issues can be managed to comport with Due Process.[14] There are several cases which discuss the possibility of dealing with state law variances through groupings and sub-classes. But the reality is, more often than not, the plaintiff needs to be able to apply one law (or set of laws) to the entire class action in order to meet the *Allison* test. How can you do it?

First, you can seek to certify only Federal Law causes of action.

Second, you can limit the class to the residents of a single state.

Third, you can argue, with respect to a single, unitary, class-wide remedy, that there is essentially only one claim, (as opposed to an aggregation of hundreds or thousands of individual claims), and hence there is only one law applicable to the common claim of the class as a whole.[15]

Fourth, you can argue, (particularly where there is a choice-of-law provision in a standard form contract), that the law of a single state, (generally the defendant's home state), should be applied to the entire cause of action.[16]

Finally, with respect to an equitable remedy, such as medical monitoring, it is curious that a court such as the Ninth Circuit in *Zinser*[17] would compare the medical monitoring requirements of the various states. Because medical monitoring is the remedy. And the equitable power of a Federal Court, even a Federal Court sitting in diversity, comes not from State Law, but from Article III of the Constitution. Therefore, once a cause of action is established, (under State Law, perhaps – which may or may not be uniform), it would seem that any Federal Court should have the same, uniform, equal power to craft an appropriate equitable remedy.

CLAIM-SPLITTING: Adequacy of Representation

As noted *supra,* there are some claim-splitting issues which can be rectified by excluding some plaintiffs from the class definition. The claim-splitting issue becomes more complicated, however, when the class representatives and other putative class members have legal theories or claims for relief which could be asserted, but would likely defeat class certification. This situation presents a catch-22 for the class representative: Either assert a claim that cannot be certified, or fail to assert a viable claim and in so doing set yourself up for a charge that you are not an adequate representative.

In *Allison,* the Fifth Circuit indicated that the dilemma could be resolved simply by

affording classmembers who wish to assert compensatory or punitive damage claims notice and an opportunity to opt out of the class. The court comments, in addressing the issue of a partial or bi-furcated certification, that: "We should make clear from the outset that... the plaintiffs have not agreed to drop their claims for compensatory and punitive damages **as a class action issue**," *Allison,* 151 F.3d at 421 (emphasis in original), which implies that the named plaintiffs could pursue such claims individually, without seeking certification of such claims on behalf of the putative class. Yet, in any event, the court specifically notes as follows:

> The plaintiffs are apprehensive that... class representatives may no longer be adequate... because they would not be able to seek for the class the full (monetary) recovery otherwise available to its members on an individual basis. In the first place, we are not certain that an adequacy of representation problem would exist under these circumstances. But even if it would, this concern might well be addressed, it seems to us, through the use of the notice and opt-out mechanism under Rule 23(d), *see, e.g., Penson,* 634 F.2d at 944; *Eubanks,* 110 F.3d at 93, 96....[18] By providing (b)(2) class members with the procedural safeguards of notice and opt-out, the district court can permit civil rights class actions to proceed under 23(b)(2) without requiring that such actions meet the stiffer substantive requirements of (b)(3), yet still ensure that the class representatives adequately represent the interests of unnamed class members.[19]

The Seventh Circuit, similarly, took a common-sense approach when objectors to a class settlement complained that the class representatives elected to proceed under RICO exclusively, rather than seeking to certify additional common law claims:

> The objectors imply that these class representatives are inadequate because they failed to investigate and deploy every potential state-law theory. Why they should have an obligation to find some way to defeat class treatment is a mystery. It is best to bypass marginal theories if their presence would spoil the use of an aggregation device that on the whole is favorable to holders of small claims.[20]

The claim-splitting issue is often raised, (somewhat ironically by defendants), in medical monitoring cases, to argue that the classmembers would be precluded from later bringing claims for damages in the event that an actual "injury" is detected or otherwise becomes manifest. Most courts have either carved out exceptions to the prevailing compulsory joinder / *res judicata* rules, or determined that they rules didn't apply because an asymptomatic person has no right to bring a "personal injury" claim. *See, e.g., Scott v. American Tobacco,* 98-0452 (La. App. 4th Cir. 11/4/98), 725 So.2d 10, 17-18, *writ denied,* 98-3016 (La. 2/26/99); *Hagerty v. L&L Marine,* 788 F.2d 315, 320 (5th Cir. 1986); *Petitio, supra,* 750 So.2d at 106.

RELIANCE

It is widely accepted that **where** individual reliance is an issue, a class cannot be certified.[21] There would need to be a hearing to determine what each class member saw, or heard, and whether he or she relied upon it, and the case would no longer meet the *Allison* test.

But individual reliance is not always an issue.

When, for example, the plaintiff class asserts a single class-wide claim for a common class-wide remedy, (as opposed to an aggregation of individualized damage claims), there is no need for proof of individual reliance, but only "reliance" (or causation) with respect to the class as a whole.

As a substantive matter, moreover, it should be pointed out that the requirement of "reliance" is misplaced. It does not comport with our current concepts of causation. Because it implies strict "but for" causation – i.e. the plaintiff would (or would not) have done X "but for" Y representation. In general, this is an outdated and overly restrictive causation test, which does not take into account the fact that many causative elements may, and often do, contribute to a particular injury or loss. As in products liability or other personal injury cases, a "concurrent" cause, or "contributing" cause, or "substantial factor" should suffice.[22]

In addition, the term "reliance" is further misleading because it implies that a fraud can only be committed through direct channels of communication. In some types of fraud cases, it is not a single representation, or series of representations, that the plaintiff relies upon to his or her detriment, but the distortion of an entire body of knowledge which can be accomplished over a number of years through many different channels of communication. And, in such cases, the concept of "reliance" does not apply.[23]

There are some statutory fraud-based causes of action for which "reliance" is expressly or impliedly not required.[24] The reason actual reliance on the fraudulent or deceptive practice in question isn't required is to allow the Government to bring a criminal or other enforcement proceeding against the offender before the damage is done; a private party who brings a civil action must still demonstrate an injury or ascertainable loss as a result of, or by reason of, the defendant's conduct – which, according to some courts, is effectively the same thing as an individualized requirement of reliance or causation.[25] Nevertheless, courts have certified classes under these statutes, either relaxing the standard or eliminating the requirement altogether.[26]

Then there is the issue of how reliance, (or other standard of causation), may be shown. From the defendant's point of view, it can only be established by the direct testimony of each and every plaintiff, under oath, subject to cross-examination.

From the plaintiff's point of view, class action attorneys have long argued that, particularly in cases of fraud by omission, (as opposed to affirmative misrepresentations – for how can you "rely" on something that was never disclosed?), reliance can be inferred from the circumstances, or simply presumed.[27]

While some courts have adopted a fraud-on-the-market type presumption in consumer

cases, most courts are reluctant to simply "presume" an essential element of plaintiffs' cause of action, particularly outside of the limited context of federal securities law violations. As a fall-back, therefore, plaintiff's attorneys seeking to certify a class should likely consult with a consumer survey analyst or other expert in market research, in order to demonstrate that causation can be established circumstantially, through surveys, polls, reaction tests, or other accepted methods of consumer research.[28]

Endnotes

1.*Allison v. CITGO Petroleum Corp.,* 151 F.3d 402 (5th Cir. 1998).

2.*Allison,* 151 F.3d at 411-413.

3.*Allison,* 151 F.3d at 414-415.

4.*See, e.g., Robinson v. Metro-North,* 267 F.3d 147 (2nd Cir. 2001), *cert. denied,* 535 U.S. 951 (2002). *See also, Lemmon v. International Union,* 216 F.3d 577 (7th Cir. 2000); *Jefferson v. Ingersoll-Rand,* 195 F.3d 894 (7th Cir. 1999); *Taylor v. District of Columbia,* 205 F.R.D. 43 (D.D.C. 2002); *citing, Eubanks v. Billington,* 110 F.3d 87 (D.C. 1997).

5.*See Spence v. Glock,* 227 F.3d 308 (5th Cir. 2000) (denying certification of design defect claims against gun manufacturers on choice-of-law grounds), *Bolin v. Sears,* 231 F.3d 970 (5th Cir. 2000) (denying certification of FDCPA claims on grounds that claims for damages predominated over claims for injunctive relief), *Berger v. Compaq,* 257 F.3d 475 (5th Cir. 2001) (denying certification of securities fraud class action on adequacy grounds), and, *Smith v. Texaco,* 263 F.3d 394 (5th Cir. 2001) (denying certification of Title VII claims for racial discrimination under *Allison*), *opinion recalled,* No. 00-40337, 2002 WL 131415 (5th Cir. Feb. 1, 2002). ***But see:*** *Mullen v. Treasure Chest Casino,* 186 F.3d 620 (5th Cir. 1999) (affirming certification of claims for damages by casino workers against employer for exposure to environmental tobacco smoke).

6.*In re: Monumental Life,* Slip Op., pp.12-14.

7.*Great-West Life v. Knudson,* 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002).

8.*Great-West,* 534 U.S. at 218 n.4, 122 S.Ct. at 717 n.4. *See also, In re: Monumental Life,* Slip Op., p.12; *citing, Coleman v. Gen. Motors Acceptance Corp.,* 296 F.3d 443, 449 (6th Cir. 2002).

9.EMPLOYEES RETIREMENT INCOME SECURITY ACT OF 1974, 29 U.S.C. §§1001, *et seq.*

10.*See, e.g., Crosby v. Soc. Sec. Admin.,* 796 F.2d 576, 580 (1st Cir. 1986); *Roman v. ESB Inc.,* 550 F.2d 1343, 1348 (4th Cir. 1976).

11.*Zapka v. Coca-Cola,* 2000 WL 1644539 (N.D.Ill. Oct. 27, 2000).

12.*Crosby, supra*, 796 F.2d at 580.

13.*See, e.g., Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020-1021 (9th Cir. 1998).

14.*Phillips Petroleum v. Shutts,* 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *Spence v. Glock,* 227 F.3d 308, 312-313 (5th Cir. 2000); *Zinser v. Accufix,* 253 F.3d 1180 (9th Cir. 2001), *amended, in part,* 273 F.3d 1266 (9th Cir. 2001); *Washington Mutual Bank v. Superior*

Court of Orange County, 24 Cal.4th 906, 926, 15 P.3d 1071, 1085, 103 Cal.Rptr.2d 320 (2001).

15.*See, e.g., Shutts,* 472 U.S. at 819-820, 105 S.Ct. at 2978 (indicating that, where there is a dispute over a "common fund", application of the law of a single state is warranted, if not required); *citing, Hartford Life Ins. v. Ibs,* 237 U.S. 662, 35 S.Ct. 692, 59 L.Ed. 1165 (1915).

16.*See, e.g., In re Great Southern Life Insurance Practices,* 192 F.R.D. 212, 217-219 (N.D.Tex. 2000) (law of Texas could be applied to all breach of contract claims based on nexus between Texas and cause of action); Symeonides, *Problems and Dilemmas in Codifying Choice of Law for Torts,* 38 Am.J.Comp.L. 431, 443, 446 (1990) ("There is nothing unfair about subjecting a tortfeasor to the law of the state in which he acted" .... "a state's policy of deterrence embodied in its conduct-regulating rules is implicated in all substandard conduct that occurs within its territory, regardless of whether the parties involved are domiciled in that state"); RESTATEMENT (SECOND) CONFLICTS, §145 cmt. b ("The protection of the justified expectation of the parties... is of lesser importance in the field of torts. This is because persons who cause injury on nonprivileged occasions.... have few, if any, justified expectations in the area of choice of law to protect, and as to them justified expectations can play little or no part in a choice of law question").

17.*Zinser v. Accufix,* 253 F.3d 1180 (9th Cir. 2001), *amended, in part,* 273 F.3d 1266 (9th Cir. 2001).

18.Other cases authorizing the use of notice and opt-out rights within the (b)(2) context include: *Smith v. Texaco,* 263 F.3d 394, 408 (5th Cir. 2001), *opinion recalled,* No. 00-40337, 2002 WL 131415 (5th Cir. Feb. 1, 2002); *Lemmon v. International Union,* 216 F.3d 577, 582 (7th Cir. 2000); *Jefferson v. Ingersoll-Rand,* 195 F.3d 894, 898 (7th Cir. 1999); *Thomas v. Albright,* 139 F.3d 227 (D.C.Cir. 1998).

19.*Allison,* 151 F.3d at 418 n.13. *See also, Hanlon, supra,* 150 F.3d at 1021.

20.*In re Mexican Money Transfer Litigation,* 267 F.3d 743, 747 (7th Cir. 2001).

21.*See, e.g., Banks v. New York Life Ins. Co.,* 98-0551 (La. 7/2/99) (on rehearing), 737 So.2d 1275, 1281; *citing, Castano v. American Tobacco,* 84 F.3d 734, 745 (5th Cir. 1996).

22.*See, e.g., In re Managed Care Litigation,* No. 00-1334, 2002 WL 246575 (S.D.Fla. Feb. 20, 2002) ("Proximate cause is not the equivalent of sole cause"; rather, "a proposed cause is a proximate cause if it is 'a substantial factor in the sequence of responsible causation'"); *Shelton v. Standard/700,* 01-0587 (La. 10/16/01), 798 So.2d 60, 64 (fraud does not have to be **the** cause of the obligation, but only something which has a "substantial influence" on the party's consent); *Varacallo v. Mass. Mut. Life Ins. Co.,* 332 N.J. Super. 31, 48, 752 A.2d 807, 816 (2000) ("Plaintiffs are required to prove only that defendant's conduct was **a** cause of damages. They need not prove that Mass Mutual's conduct was the **sole cause** of the loss"); *Haroco Inc. v. American National Bank & Trust Co.,* 747 F.2d 384, 398 (7th Cir. 1984), *aff'd per curiam,* 473 U.S. 606 (1985) ("The criminal conduct in violation of §1962 must, directly **or indirectly,** have injured the plaintiff's business or property") (emphasis supplied).

23. *See, e.g., Falise v. American Tobacco Company,* 94 F.Supp.2d 316, 335 (E.D.N.Y. 2000); *Williams v. Philip Morris,* 48 P.3d 824, 830-831 (Oregon App. 2002); *Amato v. General Motors,* 463 N.E.2d 625, 627-628 (Ohio App. 1982). *See also, Walco Investments v. Thenen,* 168 F.R.D. 315, 334-336 (S.D. Fla. 1996) (reliance not required in RICO suit where class is injured by a common fraudulent scheme).

24. *See, e.g.,* N.J.S.A. 56:8-2 (an "unlawful act" under the New Jersey Consumer Fraud Act is defined as the use of any unconscionable commercial practice, deception, or fraud with the intent that others rely on such misrepresentations or omissions, but "whether or not any person has in fact been mislead, deceived, or damaged thereby"). *See also, e.g.,* 18 U.S.C. §§1341, 1343; Minn. Stat. §325F.69.

25. *Pelletier v. Zweifel,* 921 F.2d 1465, 1498-1499 (11th Cir. 1991); *Gross v. Johnson & Johnson,* 303 N.J.Super. 336, 344-346, 696 A.2d 793, 797-798 (Law Div. 1997).

26. *See, e.g., Varacallo v. Mass. Mut. Life Ins. Co.,* 332 N.J. Super. 31, 752 A.2d 807 (2000). (*See also* several of the cases cited in Endnotes 23, 27, and 28.)

27. *See, e.g., Basic, Inc. v. Levinson,* 485 U.S. 224, 245, 108 S.Ct. 978, 990-91, 99 L.Ed.2d 194 (1988); *Affiliated Ute Citizens v. United States,* 406 U.S. 128, 153-154, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972); *Blackie v. Barrack,* 524 F.2d 891, 906 (9th Cir. 1975), *cert. denied,* 429 U.S. 816 (1976); *Peterson v. H&R Block,* 174 F.R.D. 78, 85 (N.D.Ill. 1997); *Walsh v. Northrop Grumman,* 162 F.R.D. 440, 446 (E.D.N.Y. 1995); *Baughman v. State Farm,* 727 N.E.2d 1265, 1275 (Ohio 2000); *Cope v. Metropolitan Life,* 696 N.E.2d 1001, 1008 (Ohio 1998); *Vasquez v. Superior Court of San Joaquin,* 4 Cal.3d 800, 814-815, 484 P.2d 964, 972-973, 94 Cal.Rptr. 796 (1971). *See also, generally, Newberg* (3rd ed. 1992) §4.26; Issacharoff, *The Vexing Problem of Reliance in Consumer Class Actions,* 74 Tul.L.Rev. 1633 (2000).

28. *See, e.g.,* Shapiro and Katz, "Judge Easterbrook's New Look at Proving Class Claims of Deception" *Class Action Litigation Report* (BNA Dec. 22, 2000), p.628; *citing, Gammon v. GC Services,* 27 F.3d 1254,1259 (7th Cir. 1994) (Easterbrook, J., concurring); *Kraft v. FTC,* 970 F.2d 311 (7th Cir. 1992); *Johnson v. Revenue Management,* 169 F.3d 1057, 1060-61 (7th Cir. 1999); *Walker v. National Recovery,* 200 F.3d 500, 503 (7th Cir. 1999); *Pettit v. Retrieval Masters Creditors Bureau,* 211 F.3d 1057, 1060-62 (7th Cir. 2000). *See also, Group Health Plan, Inc. v. Philip Morris,* 621 N.W.2d 2, 14 (Minn. 2001); *In re: Lutheran Brotherhood Variable Ins. Sales Practices Lit.,* 201 F.R.D. 456, 463-464 (D. Minn. 2001); *LensCrafters v. Vision World,* 943 F.Supp. 1481, 1489 (D. Minn. 1996). *See also, La. Civ. Code art.* 1957; Johnston, *Louisiana Civil Law Treatise: Civil Jury Instructions* §2.04.