

THE USE OF THE CLASS ACTION DEVICE IN AGRICULTURAL PRODUCTS LITIGATION

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I. INTRODUCTION

There has been an explosion in products liability class actions in the last several years.¹ Recent targets of class action include tobacco,² handguns,³ laptop computers,⁴ health insurance,⁵ water heaters,⁶ life insurance,⁷ and telephone service industries.⁸ Class action lawyers filing these cases are able, aggressive, and well financed.

Although intended to be a procedural device designed to enhance judicial economy, the class certification determination has evolved into the single most important event in the case. The certification of a class alone can effectively compel a defendant to settle because one adverse verdict in a class action case adjudicates all similar claims against it. In many instances, such a verdict could jeopardize a defendant's existence. In recognizing this reality, the United States Fifth Circuit Court of Appeals compared class certification to "judicial blackmail" of a corporate defendant where the claims lack merit.⁹ The Seventh Circuit recently highlighted the pressure placed on defendants faced with potential class action liability:

Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere. [The court] observes not only that class actions can have this effect on risk-averse corporate executives (and corporate counsel) but also that some plaintiffs or even some district judges may be tempted to use the class device to bring settlements from defendants whose legal positions are justified but unpopular (citations omitted).¹⁰

1. A recent survey found that between 1988 and 1998 state court class actions increased by more than 1300% and federal court class actions were up more than 340%. *See Analysis: Class Action Litigation—A Federalist Society Survey, Part II*, CLASS ACTION UPDATE (The Federalist Soc'y for L. & Pub. Pol'y Studies, Washington, D.C.), Spring 1999, at 1, 6.

2. *See, e.g.,* *Badillo v. American Brands, Inc.*, No. 34300, 2001 WL 79884, at *1 (Nev. Jan. 30, 2001); *Simon v. Philip Morris Inc.*, 124 F. Supp. 2d 46, 49 (E.D.N.Y. 2000).

3. *See, e.g.,* *Spence v. Glock*, 227 F.3d 308, 310 (5th Cir. 2000).

4. *See, e.g.,* *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 946 (E.D. Tex. 2000).

5. *See, e.g.,* *Mason v. Prudential Ins. Co. of Am.*, No. 1982190, 2000 WL 1716946, at *1 (Ala. Nov. 17, 2000).

6. *See, e.g.,* *Heilman v. Perfection Corp.*, 93 F. Supp. 2d 1311, 1312 (W.D. Mo. 2000).

7. *See, e.g.,* *Justin v. Metropolitan Life Ins. Co.*, No. Civ.A.00-2208, 2000 WL 1741858, at *1 (E.D. La. Nov. 20, 2000).

8. *See, e.g.,* *Smith v. GTE Corp.*, No. 99-12833, 2001 WL 10395, at *1 (11th Cir. Jan. 4, 2001).

9. *See* *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). *See also In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3rd Cir. 1995) (stating "class actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the *threat* of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' actual worth"); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (stating class certification subjects defendants to enormous exposure "and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.").

10. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (citing *In re Rhone-*

Class actions have recently been introduced to agricultural products litigation. Agricultural claims, however, are often highly individualized because of the multitude of factors that affect agricultural performance. Also, alleged damages in agricultural products cases are often fairly large. Consequently, there is an obvious tension between the requisite “commonality” among class members’ claims needed in class actions and agricultural products claims. This Article examines that tension and concludes that because of the nature of agricultural practices and agricultural products litigation, agricultural products claims should not be handled as class actions.

II. CLASS ACTION PRECEPTS

A. *Class Actions Are Different from Non-Class Actions*

Class actions are different from single plaintiff actions. Historically and under modern jurisprudence, a class action is a non-traditional litigation procedure that permits a representative with typical claims to sue on behalf of, and stand in judgment for a class, provided that the representative can establish the prerequisites to class certification.¹¹ Class actions were designed to give individual claimants with small claims access to judicial relief that otherwise would be economically unavailable by individual litigation.¹² Thus, if there are few potential claimants who have large potential recoveries, a class action is generally inappropriate.¹³ The class certification prerequisites should be construed in light of these purposes.¹⁴

B. *A Brief History of Class Actions and Current Class Action Precepts*

The class action rule was originally adopted with the Federal Rules of Civil Procedure in 1938.¹⁵ Original Rule 23 provided for three types of class actions: the

Poulenc Roper, Inc., 51 F.3d 1293 (7th Cir. 1995)).

11. See *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 402 (1980); *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 366-67 (1921).

12. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622 (1997) (describing class actions as designed for vindication of “the rights of groups of people who individually would be without effective strength to bring their opponents into court at all” (citing Advisory Committee notes to FED. R. CIV. P. 23(b)(3))); *Deposit Guaranty Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980) (“Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.”). See also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (“Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually . . . [T]his lawsuit involves claims averaging about \$100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.”).

13. See *Amchem*, 521 U.S. at 613 (holding numerosity is a threshold requirement applicable to all class actions). See also *Castano*, 84 F.3d at 748; *In Re Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1297-1300.

14. See 1 HERBERT NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* § 106 (3rd ed. 1992).

15. See FED. R. CIV. P. 23 advisory committee’s note; 1 NEWBERG & CONTE, *supra* note 14, §

“true” class action, which included the rights of all class members whether named in the suit or not; the “hybrid” class action, in which class members made separate claims against a common fund or property; and the “spurious” class action in which the members of the class made separate claims involving common questions of law or fact.¹⁶ In 1966, the Advisory Committee on the Rules of Civil Procedure completely revamped Rule 23.¹⁷ The new rule clarified the prerequisites for maintaining class actions, attempted to ensure that a judgment for all class members was reached, and added measures to ensure the just conduct of class actions.¹⁸ Rule 23 is still in effect today.¹⁹

Subdivision (a) of Rule 23 prescribes four prerequisites necessary for maintaining all class actions.²⁰ Subdivision (b) of Rule 23 describes the additional elements of three types of class categories.²¹ Rule 23(a) requires the following prerequisites for all class actions:²² (1) the class is so numerous that joinder of all members is impracticable (“numerosity”);²³ (2) questions of law or fact are common to the class (“commonality”);²⁴ (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (“typicality”);²⁵ and (4) the representative parties and class counsel will fairly and adequately protect the interests of the class (“adequacy of representation”).²⁶

The three types of class action available under Rule 23 are described in Rule 23(b)(1), (b)(2), and (b)(3) and were summarized by the Supreme Court in *Amchem Products, Inc. v. Windsor*.²⁷ Rule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing “incompatible standards of conduct for the party opposing the class,”²⁸ or would “as a practical matter be dispositive of the interests” of nonparty class members “or substantially impair or impede their ability to protect their interests.”²⁹ “Rule 23(b)(1)(A) ‘takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical

1.09, at 1-25.

16. See 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1752 (2d ed. 1986).

17. See *id.* § 1753.

18. See PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, 39 F.R.D. 73, 97-98 (1966).

19. See FED. R. CIV. P. 23; 1 NEWBERG & CONTE, *supra* note 14, § 1.08.

20. See FED. R. CIV. P. 23(a).

21. See 1 Newberg & Conte, *supra* note 14, § 1.08.

22. Additional class action “requirements” not expressly stated in Rule 23 are discussed *infra* Part III.A.

23. See FED. R. CIV. P. 23(a).

24. See *id.*

25. See *id.*

26. See *id.*

27. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997).

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

29. FED. R. CIV. P. 23(b)(1)(B); *Amchem*, 521 U.S. at 614.

necessity (a riparian owner using water as against downriver owners).”³⁰ “Rule 23(b)(1)(B) includes, for example, ‘limited fund’ cases, instances in which numerous persons make claims against a fund insufficient to satisfy all claims.”³¹

“Rule 23(b)(2) permits class actions for declaratory or injunctive relief where ‘the party opposing the class has acted or refused to act on grounds generally applicable to the class. Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples.’”³² Subdivision (b)(3) permits a class action in all circumstances where the prerequisites of Rule 23(a) are met and, in addition, the court determines that questions of law or fact common to members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.³³ In adding “predominance” and “superiority” to the qualification-for-certification list, the Advisory Committee sought to cover cases “in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.”³⁴ Matters pertinent to the predominance and superiority inquiries 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 particular forum; and
- (D) The difficulties likely to be encountered in the management of a class action.³⁵

A Rule 23(b)(3) class possesses distinct characteristics not present in other classes. First, Rule 23(b)(3), unlike Rule 23(b)(1) and Rule 23(b)(2), requires giving notice of the action to all class members who can be identified through reasonable efforts.³⁶ Another unique characteristic of Rule 23(b)(3) is that class members are given the opportunity to exclude themselves (or “opt-out”) from the class.³⁷ Class members who exclude themselves are free to pursue their own actions unaffected by the class

30. *Amchem*, 521 U.S. at 614 (quoting Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 388 (1967)).

31. *Id.*

32. *Id.* (citing Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 389 (1967)).

33. *See id.* at 622-23.

34. *Id.* at 625 (citing advisory committee note, 28 U.S.C. app. at 697).

35. FED. R. CIV. P. 23(b)(3).

36. *See* FED. R. CIV. P. 23(c)(2).

37. *See id.*

litigation.³⁸ Rule 23(b)(1) and Rule 23(b)(2) do not give class members this opportunity, and consequently, include all potential class members who are then bound by class rulings.³⁹ Therefore, Rule 23(b)(1) and Rule 23(b)(2) class actions are known as “mandatory” class actions.⁴⁰

The remainder of this Article focuses on Rule 23(b)(3) class actions and their state law analogues.⁴¹ It has been our experience that most agricultural products cases seek money damages rather than injunctive relief. Thus, agricultural products cases will generally fall under Rule 23(b)(3).

C. *Class Action Requirements*

To certify a class, the plaintiff must prove that all of the Rule 23 requirements are met.⁴² The failure to establish any one of Rule 23’s requirements will completely defeat the certification effort.⁴³ The prerequisites are addressed below with an eye toward agricultural products cases.

1. *There Must Be an Identifiable Class*

Although not expressly itemized in Rule 23(a), an identifiable class is required for class certification.⁴⁴ The class definition should be clear enough to determine who is included in the class.⁴⁵ Class definition is important because when a proposed class is certified, the class definition will determine the persons entitled to relief, the persons who will be bound by a judgment, and the persons who will receive notice in a Rule 23(b)(3) action.⁴⁶ To that end, courts require that the class definition be “precise, objective, and presently ascertainable.”⁴⁷

Class definitions that are overly broad ordinarily do not pass court muster.⁴⁸ Class definitions have been rejected as overly broad when the class encompasses members with claims that differ in some degree from those of the named plaintiffs.⁴⁹

38. *See id.*; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810-11 (1985); *Yandle v. PPG Indus., Inc.*, 65 F.R.D. 566, 569 (E.D. Tex. 1974).

39. *See* FED. R. CIV. P. 23(b)(1)-(3).

40. *See* *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 n.13 (1999).

41. Approximately 36 states have adopted class action rules similar to current federal Rule 23. *See* 3 NEWBERG & CONTE, *supra* note 14, § 13.04. Even states that have not adopted class action rules paralleling amended Rule 23 will routinely apply federal court class action principles. *See, e.g.*, *Banks v. New York Life Ins. Co.*, 737 So. 2d 1275, 1279-80 (La. 1999).

42. *See In re American Med. Sys., Inc.*, 75 F.3d 1069, 1078-79 (6th Cir. 1996); *Buford v. H&R Block, Inc.*, 168 F.R.D. 340, 348 (S.D. Ga. 1996).

43. *See* *Buford*, 168 F.R.D. at 348.

44. *See* *General Tel. Co. v. Falcon*, 457 U.S. 147, 156 (1982).

45. *See* FEDERAL JUDICIAL CENTER, *MANUAL FOR COMPLEX LITIGATION* § 30.14, at 217-19 (3rd ed. 1995).

46. *See id.* *See also* *Zapata v. IBP, Inc.*, 167 F.R.D. 147, 156 (D. Kan. 1996).

47. FEDERAL JUDICIAL CENTER, *supra* note 45, § 30.14, at 217.

48. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997).

49. *See* *McElhaney v. Eli Lilly & Co.*, 93 F.R.D. 875, 878 (D.S.D. 1982).

Other class definitions have been rejected as too broad when the plaintiffs' claims required varying kinds of proof.⁵⁰ Ambiguous or amorphous class definitions have also met with court disapproval.⁵¹

Courts have not been favorably disposed toward classes defined by reference to objective criteria.⁵² Objective criteria for defining classes include geographic boundaries, time limitations, and the purchase of particular products.⁵³ Class definitions that are drafted in objective terms also do not pass court muster if class membership requires an individualized inquiry.⁵⁴ Similarly, courts have rejected class definitions that are framed objectively when subjective considerations such as state of mind are involved.⁵⁵ Finally, a class definition cannot be based on a legal conclusion regarding the defendant's liability.⁵⁶

2. *The Named Plaintiffs Must Have Standing*

Standing of the named plaintiffs is a second threshold inquiry mandating examination before considering the explicit Rule 23 requirements.⁵⁷ To satisfy standing, the class representative must suffer an injury and must have the same interests and the same injuries as the class members.⁵⁸ Class representatives cannot represent a class of which they are not a part, and they can only represent a class of which they are a part if

50. See *Sandles v. Ruben*, 89 F.R.D. 635, 636 (S.D. Fla. 1981).

51. See, e.g., *Earnest v. General Motors Corp.*, 923 F. Supp. 1469, 1473-74 (N.D. Ala. 1996). In *Earnest*, the class was defined as "any persons in the state of Alabama who own or lease, or have in the past owned or leased vehicles equipped with engines and/or engine control modules manufactured, sold, assembled and/or designed by the defendants such as those in the said vehicles of the named plaintiffs." *Id.* at 1473. The court held that the proposed definition was impermissibly amorphous for lack of any guidance as to what vehicles would constitute a vehicle such as plaintiff's, and because the phrase "any persons in the state of Alabama" was subject to multiple interpretations. *Id.*

52. See *Reilly v. Gould, Inc.*, 965 F. Supp. 588, 596 (M.D. Pa. 1997). See also *Daigle v. Shell Oil Co.*, 133 F.R.D. 600, 602 (D. Colo. 1990).

53. See *Reilly*, 965 F. Supp. at 596.

54. See *Newton v. Southern Wood Piedmont Co.*, 163 F.R.D. 625, 633 (S.D. Ga. 1995), *aff'd without opinion*, 95 F.3d 59 (11th Cir. 1996). In *Newton*, the plaintiffs defined the class as those who had been exposed to chemicals released from the defendant's plant and who had "specifically evidenced a keritosis." *Id.* at 632. The court found the class definition to be fundamentally defective because class membership would be determined by highly individualized inquiries into each class member's experience. See *id.* Specifically, the court would have to consider "(i) the length of time a particular plaintiff resided in the area near the Southern Wood Piedmont Plant site; (ii) the duration of exposure to the chemicals released by the plant; (iii) the dosage of chemicals received by each plaintiff; (iv) the method of exposure to the chemicals by each plaintiff; and (v) individual health and medical histories." *Id.*

55. See *Wilcox Dev. Co. v. First State Bank*, 97 F.R.D. 440, 445 (D. Or. 1983).

56. See *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398, 400 (Tex. 2000).

57. See *Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. Unit A 1981). See also *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 733 (3rd Cir. 1970) (holding that a reduction in value of corporate shares is not enough to constitute standing).

58. See *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1976).

they share common interests and injuries with the class.⁵⁹ To satisfy standing, the class representative must show that he or she “personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant . . . the injury fairly can be traced to the challenged action, and [it] is likely to be addressed by a favorable decision.”⁶⁰

3. *Numerosity*

To satisfy this requirement, plaintiffs must prove that the class is so numerous that joinder is impracticable.⁶¹ The numerosity requirement demands that joinder be extremely difficult or inconvenient.⁶² Plaintiffs cannot maintain the burden of showing numerosity by virtue of conclusory allegations or mere speculation regarding the size of the class.⁶³

While there are no rigid numerical guidelines for determining the impracticability of joinder, courts have generally observed that proposed classes with less than twenty-one members are inadequate, classes with more than forty are adequate, and classes with members in between are given varying treatment.⁶⁴ Although the mere number of class members is not controlling, it is an essential precondition to meeting the numerosity requirement.⁶⁵ For proposed classes between twenty-one and forty, courts generally look to three factors to determine whether the class should be certified.⁶⁶ These factors are: (1) the potential size of the claim of each class member; (2) the geographic dispersion of the class members; and (3) the ease of identification of the class members.⁶⁷ Large claims, geographic concentration, and easy identification of class members factor against class certification for proposed classes numbering more than twenty-one but less than fifty.⁶⁸

59. See *Bailey v. Patterson*, 369 U.S. 31, 32 (1962). See also *Rodriguez*, 431 U.S. at 403.

60. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). The representative plaintiffs cannot use the procedural requirements of Rule 23 to create standing if it otherwise does not exist. See *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 694 (E.D. Pa. 1973).

61. See FED. R. CIV. P. 23(a)(1).

62. See, e.g., *German v. Federal Home Loan Mortgage Corp.*, 885 F. Supp. 537, 552 (S.D. N.Y. 1995).

63. See, e.g., *Fleming v. Travenol Lab., Inc.*, 707 F.2d 829, 833 (5th Cir. 1983); *Stevens v. City of Baton Rouge*, 700 F. Supp. 869, 873 (M.D. La. 1988), *aff'd*, 884 F.2d 576 (5th Cir. 1989).

64. See *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986).

65. See *Goldblum v. Boyd*, 60 F.R.D. 421, 426 (W.D. La. 1973).

66. See, e.g., *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. 1981). See also *Cox*, 784 F.2d at 1553.

67. See *Zeidman*, 651 F.2d at 1038.

68. See *id.* at 1038-40. See also *Cox*, 784 F.2d at 1553.

4. Commonality

The commonality, typicality, and adequacy of representation requirements tend to merge.⁶⁹ Together, commonality, typicality, and adequacy of representation “serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.”⁷⁰

Rule 23(a)(2) requires that there be questions of law and fact common to the class.⁷¹ Most courts have found commonality relatively easy to satisfy.⁷² Commonality does not require that all issues be identical.⁷³ In Rule 23(b)(3) class actions, courts generally focus on predominance of common issues⁷⁴ and not on the Rule 23(a)(2) commonality requirement.⁷⁵

However, commonality has been found lacking in products liability cases where the product is individualized and plaintiff-specific, as is the case in agricultural products cases.⁷⁶ *In re American Medical Systems, Inc.*,⁷⁷ involved a proposed Rule 23(b)(3) class of penile prosthesis recipients asserting products liability claims.⁷⁸ Commonality was not satisfied because a “variety of factors” including surgical error, improper use of the penile prosthesis, anatomical incompatibility, infection, and psychological problems varied from plaintiff to plaintiff.⁷⁹

*Ikonen v. Hartz Mountain Corp.*⁸⁰ provides another illustration of why individual issues are often overwhelming in user-specific products liability cases.⁸¹ *Ikonen* involved a class action against a manufacturer of flea and tick spray that allegedly poisoned animals when applied to the skin.⁸² The plaintiffs failed to meet the commonality requirement because the individual case histories of the pets and each class member involved different negligence, strict products liability, breach of warranty, fraud, and adequacy of warning issues.⁸³

69. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 & n.20 (citing *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982)).

70. *Id.*

71. See *id.* at 613.

72. See *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). See also *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986).

73. See *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995).

74. See *Amchem*, 521 U.S. at 623-24.

75. See *id.* at 613.

76. See, e.g., *In re American Med. Sys.*, 75 F.3d 1069, 1081 (6th Cir. 1996); *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988).

77. *In re American Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996).

78. See *id.* at 1084.

79. See *id.* at 1081.

80. *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258 (S.D. Cal. 1988).

81. See *id.* at 264.

82. See *id.* at 260.

83. See *id.* at 262.

5. Typicality

The Rule 23(a)(3) typicality requirement focuses on whether the class representatives' claims have the same essential characteristics as the claims of the class at large.⁸⁴ Typicality exists when "the claims of both the class representatives and absent class members 'stem from a single event or are based on the same legal or remedial theory.'"⁸⁵

Typicality has been found lacking in products liability cases involving discreet issues of liability and causation.⁸⁶ For example, typicality was found lacking in *In re American Medical Systems* because of the large range of user-sensitivity to the penile prosthesis at issue.⁸⁷

Similarly, in *Ikonen v. Hartz Mountain Corp.*, typicality was lacking because each animal had been injured in a different way and to a different degree by the flea and tick spray manufactured by the defendant.⁸⁸ Additionally, the court noted that it would be necessary to decide whether the product proximately caused such harm in each individual case.⁸⁹

*Jeanides v. U.S. Home*⁹⁰ is yet another illustration of where a court found typicality lacking.⁹¹ In *Jeanides*, the plaintiffs brought an action against a contractor based on the contractor's alleged failure to construct various houses in conformity with plans and specifications for each house.⁹² The court found typicality lacking because of the diverse location, design, and construction of each house.⁹³ The court also noted that "the proof plaintiffs will need to present to win their case will not provide the same proof the prospective class members will need to present."⁹⁴ Further, class representatives and putative class members would not rely on the same construction documents and the contractor's defenses would differ and would be unique to each homeowner.⁹⁵

84. See, e.g., *Retired Chicago Police Ass'n v. Chicago*, 7 F.3d 584, 596-97 (7th Cir. 1993).

85. *Kuenz v. Goodyear Tire & Rubber Co.*, 104 F.R.D. 474, 477 (E.D. Mo. 1985). See also *Becher v. Long Island Lighting Co.*, 164 F.R.D. 144, 151 (E.D.N.Y. 1996); *Kornberg v. Carnival Cruiselines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) ("In other words, there must be a nexus between the class representative's claims or defenses and the common questions of fact or law which unite the class.").

86. See *In re American Med. Sys.*, 75 F.3d 1069, 1082 (6th Cir. 1996); *Ikonen*, 122 F.R.D. at 263.

87. See *In re American Med. Sys.*, 75 F.3d at 1082.

88. See *Ikonen*, 122 F.R.D. at 263.

89. See *id.*

90. *Jeanides v. U.S. Home*, 114 F.R.D. 29 (N.D. Ill. 1987).

91. See generally *id.* (declining to broadly categorize defendant's conduct as "poor construction workmanship").

92. See *id.* at 29.

93. See *id.* at 30.

94. *Id.*

95. See *id.* See also *Hurd v. Monsanto Co.*, 164 F.R.D. 234, 239 (S.D. Ind. 1995) (determining typicality was not met in proposed class action against manufacturer of polychlorinated biphenyls, commonly known as PCBs, because no set of operative facts established liability and no single proximate cause analysis applied to all class members); *Kurcz v. Eli Lilly & Co.*, 160 F.R.D. 667, 677-78 (S.D. Ohio 1985) (finding typicality defeated by required individualized proof of causation and differences in

From the other side of the equation, affirmative defenses and counterclaims may show lack of typicality.⁹⁶ For example, statutes of limitation defenses are often claim specific in products liability cases.⁹⁷

6. *Adequacy of Representation*

Rule 23(a)(4) requires that the named plaintiffs “will fairly and adequately protect the interests of the class.”⁹⁸ Adequacy of representation turns on the lack of conflict between the main representative and the class and the ability of the representative to “demonstrate that he will vigorously prosecute the action, and provide both adequate financing and competent counsel.”⁹⁹

The first factor requiring plaintiffs to share common interests with the members of the class can be analyzed under either the adequacy of representation requirement or the typicality requirement.¹⁰⁰ As stated by the Fifth Circuit, “the requirements are closely related, for demanding typicality by the representative helps ensure his adequacy as representative.”¹⁰¹ The intra-class conflict component to adequacy of representation is a matter of due process.¹⁰² *Hansberry v. Lee*,¹⁰³ the leading case on adequacy of representation, makes this clear:

It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in a litigation, is either to assert a common right or to challenge an asserted obligation. It is quite another to hold that all of those who are free alternatively either to assert rights or to challenge them are of a single class, so that any

representations about birth control drugs given to different women).

96. See, e.g., *In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 853 (9th Cir. 1982); *Yandle v. PPG Indus.*, 65 F.R.D. 566, 571 (E.D. Tex. 1974).

97. See, e.g., *Barnes v. American Tobacco Co.*, 161 F.3d 127, 149 (3rd Cir. 1998) (“determining whether each class member’s claim is barred by the statute of limitations raises individual issues that prevent class certification”); *In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d at 853.

98. FED. R. CIV. P. 23(a)(4). There is some dispute on the burden of proof under Rule 23(a)(4). Most courts have held that the plaintiff carries the burden of proving all of the Rule 23(a) requirements, including adequacy of representation. See, e.g., *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996); *Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 348 (S.D. Ga. 1996); *Morel v. Giuliani*, 927 F. Supp. 622, 632 (S.D.N.Y. 1995); *Arnold v. United Artists Theater Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994); *Riordan v. Smith-Barney*, 113 F.R.D. 60, 62 (N.D. Ill. 1986). At least one court has held, however, that the party challenging class certification has the burden of proving the inadequacy of the named representative. See *Welch v. Board of Dirs.*, 146 F.R.D. 131, 136 (W.D. Pa. 1993).

99. *Brooks v. Southern Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 58 (S.D. Fla. 1990). See also *Brown v. Cameron-Brown Co.*, 92 F.R.D. 32, 40 (E.D. Va. 1981).

100. See *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 485 n.27 (5th Cir. 1982).

101. *Id.*

102. See *Hansberry v. Lee*, 311 U.S. 32, 44 (1940) (stating that because of potentially conflicting interests of putative parties to the agreement it is improbable that any two of them are of the same class, and with due regard for the protection of absent parties due process is required).

103. *Hansberry v. Lee*, 311 U.S. 32 (1940).

group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such selection of representatives . . . does not afford that protection to absent parties which *due process* requires.¹⁰⁴

Amchem spoke practically to the intra-class conflict of adequacy of representation.¹⁰⁵ *Amchem* concluded that adequacy of representation was not satisfied because the named plaintiffs' interests were not aligned with the class: "Most saliently, for the currently injured, the critical goal is generous immediate payments. A goal that tugs against the interests of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future."¹⁰⁶

The vigorous prosecution component to adequacy of representation touches upon both the class representatives and class counsel. Under the vigorous prosecution inquiry, the court must consider the fitness, competency, and responsibility of both the named representative and counsel.¹⁰⁷ The proposed class representatives need not be sophisticated in the law.¹⁰⁸ They are, however, required to be reasonably knowledgeable about the cause of action and their role as class representatives.¹⁰⁹ Class representatives who demonstrate an "alarming unfamiliarity with the suit" should be rejected.¹¹⁰

7. *Predominance*

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."¹¹¹ Predominance focuses

104. *Id.* at 44-45 (emphasis added) (citations omitted).

105. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-28 (1997).

106. *Id.* at 626. *See also Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997) (stating because the named plaintiffs' interests would have been antithetical to the interest of other class members, the named plaintiffs could not have adequately represented such class members); *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 594 (7th Cir. 1993) (stating that because a class representative asserted claims that would have, if successful, decreased benefits for certain putative class members, the court found that the named plaintiff was an inadequate representative).

107. *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 449 (3rd Cir. 1977).

108. *See id.* *See also Greenspan v. Brassler*, 78 F.R.D. 130, 133 (S.D.N.Y. 1978) (stating that plaintiffs must be able to fairly and adequately protect the interests of the class).

109. *See, e.g., id.* (requiring that plaintiffs meet with the attorney and have an understanding of the elements and basic groundwork of the action).

110. *Id.* *See also Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 728 (11th Cir. 1987) (when the named plaintiffs' "participation is so minimal that they virtually have abdicated to their attorneys the conduct of the case" then the class must not be certified); *Butterworth v. Quick & Reilly, Inc.*, 171 F.R.D. 319, 322-23 (M.D. Fla. 1997) ("plaintiff [who] fails to demonstrate that she is familiar with the facts of her case sufficiently enough to represent the proposed class' cannot be named as a class representative"); *Lubin v. Sybedon Corp.*, 688 F. Supp. 1425, 1462 (S.D. Cal. 1988) (stating that inadequate knowledge of the circumstances make it improper to entrust individual with burden of representing fellow limited partners); *White v. Ensearch Corp.*, 78 F.R.D. 547, 548 (N.D. Tex. 1978) (stating that plaintiff's lack of knowledge as to any basis for the lawsuit and civil action, and his duties and responsibilities as to any class mandate make the action improper).

111. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

on the number and significance of common questions, as opposed to individual issues.¹¹² The predominance inquiry is far more demanding than Rule 23(a)'s commonality requirement.¹¹³ Predominance targets causation, liability, damages and extent of damages issues in products liability and consumer cases.¹¹⁴

Class actions asserting fraud and misrepresentation claims usually fail the predominance inquiry.¹¹⁵ Predominance is routinely not met in multi-state class actions where variations in state law "swamp" common issues.¹¹⁶

8. Superiority

The superiority inquiry requires the court to find that the class action objectives will be achieved.¹¹⁷ "An incorrect predominance finding also implicates the court's superiority analysis" since the "greater the number of individual issues, the less likely superiority can be established."¹¹⁸ To meet superiority, the plaintiffs must show that the class action device "would be better than, and not just equal to, other methods of adjudication."¹¹⁹

112. See *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472-73 (5th Cir. 1986).

113. See *Amchem*, 521 U.S. at 623-24.

114. See, e.g., *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, 177 F.R.D. 360, 372-73 (E.D. La. 1997) (stating that plaintiffs did not prove predominance of common issues where evidence indicated that after-market modifications, environmental factors, and variations in individual use and maintenance all affected handling and stability of vehicle.); *In re Stucco Litig.*, 175 F.R.D. 210, 215 (E.D.N.C. 1997) (holding in a case involving exterior insulation and finishing, class failed the predominance inquiry because of the "individualized issues" related to different contractors, architects and installers, and because of the "question of compensation for physical damage to the homes" implicated "myriad 'house specific' issues, including but not limited to the type of repair needed on each house, local building code requirements, the costs of materials needed for the repairs, and labor rates in varying locales"); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 424-25 (E.D. La. 1997) (finding that issues such as different manufacturing practices for different types of siding, individual installation of siding, and the location and climate around each house caused individual issues to "overwhelm" common issues); *Ilhardt v. A.O. Smith Corp.*, 168 F.R.D. 613, 619 (S.D. Ohio 1996) (holding common issues did not predominate where multiple factual variations existed regarding models, installation procedures, product use, and environmental factors); *Banks v. New York Life Ins. Co.*, 737 So. 2d 1275, 1283 (La. 1999) (holding that when causation and injury involve individual issues, predominance and superiority are not met). See also *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 219-20 (E.D. La. 1998); *Arch v. American Tobacco Co.*, 175 F.R.D. 469, 488-89 (E.D. Pa. 1997); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 342-43 (D. N.J. 1997); *Harding v. Tambrands, Inc.* 165 F.R.D. 623, 629-30 (D. Ka. 1996).

115. See *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996); *Banks*, 737 So. 2d at 1281 (fraud and misrepresentation claims prevent predominance when they involve individual reliance).

116. See *Costano*, 84 F.3d at 741. See also *In re American Med. Sys. Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996).

117. See *Morris v. Transouth Fin. Corp.*, 175 F.R.D. 694, 701 (M.D. Ala. 1997); 7A WRIGHT & MILLER, *supra* note 16, § 1779.

118. *Castano*, 84 F.3d at 745 n.19.

119. *Buford v. H&R Block, Inc.*, 168 F.R.D. 340, 361 (S.D. Ga. 1996).

“Methods of adjudication” may encompass more than just single plaintiff litigation.¹²⁰ It may also include administrative remedies, such as product recalls.¹²¹ For example, in *Chin v. Chrysler Corp.* the court noted that voluntary and administrative recalls providing for the inspection and repair or replacement of defective brakes was superior to a class action.¹²²

Finally, a trend has developed in the jurisprudence that novel cases are not susceptible to class treatment.¹²³ Thus, if the product or service at issue is new to class action litigation or if the plaintiff’s claims are untested, a class action may not be a superior method of adjudication.

III. UNDERLYING FACTUAL ISSUES IN AGRICULTURAL PRODUCTS CASES

Agricultural products cases often involve allegations of product under-performance that negatively impacts crop production.¹²⁴ However, numerous management and environmental conditions prior to and during the growing season affect crops. The ultimate effect upon production is variable and difficult to measure.¹²⁵ Not

120. See *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 464 (D.N.J. 1998).

121. See *id.*

122. See *id.* at 464-65.

123. See *Castano v. American Tobacco Co.*, 84 F.3d 734, 750 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995); *Young v. Ray Brandt Dodge, Inc.*, 176 F.R.D. 230, 234 (E.D. La. 1997). See also *Ford v. Murphy Oil U.S.A., Inc.*, 703 So. 2d 542, 550 (La. 1997) (holding that when plaintiff’s claims are novel and untested, it is “impossible” for plaintiffs to prove the class action procedure as appropriate).

124. See, e.g., *Byone v. Monsanto Co.*, No. 99-1277A, slip op. at 1 (W.D. La. Apr. 26, 2000).

125. Courts have recognized that “there are a multitude of factors that could contribute to crop-loss and each growers’ planting techniques and environmental influences individualize his claims against defendants.” *Id.* at 12. Furthermore, because of multiple factors that impact crops, courts have noted that agricultural product companies do not ensure crop success: “it is appropriate to shift the risk of loss to the farmer,” by the use of warranty disclaimers and limitations of liability, “given the many uncertainties and variables that exist in the farming business.” *Gooch v. E.I. Du Pont De Nemours & Co.*, 40 F. Supp. 2d 863, 872 (W.D. Ky. 1999). With respect to liability exclusion clauses the Fifth Circuit has stated:

The decision of [an agricultural products] manufacturer to limit damages would seem, in the absence of other evidence, abundantly to fulfill this risk-allocation function, because the uncertainties inherent in the agricultural business are legion, and many of them, such as plaintiff, cultivating, harvesting and making decisions, are uniquely within the control of the farmer

Lindemann v. Eli Lilly & Co., 816 F.2d 199, 204 (5th Cir. 1987).

In concluding its response to the Eleventh Circuit, the Supreme Court of Alabama noted several reasons why these limitation of remedies clauses have become accepted in the agricultural chemical industry:

(1) the vagaries of nature and the nature of such product; (2) the fact that the numerous factors affecting crop yield are beyond the manufacturer’s control; (3) the fact that if the potential for consequential losses were shifted to the seller, the cost of the product would be prohibitive; and (4) the fact that crop insurance is available to the farmer to mitigate any burdensome effect that such an exclusion would have.

Moorer v. Hartz Seed Co., 120 F. Supp. 2d 1283, 1296 (M.D. Ala. 2000) (quoting in part *Southland Farms, Inc. v. Ciba-Geigy Corp.*, 575 So. 2d 1077, 1081 (Ala. 1991)). See also *Billings v. Joseph Harris Co.*, 220

only do these numerous factors directly affect crop production, they interact with each other so that the magnitude and variety of potential impacts on crop yield and quality is extensive.¹²⁶

Because there are virtually endless numbers of possible combinations of factors impacting every field to varying degrees, each individual field encounters a totally unique set of management and environmental conditions each growing season.¹²⁷ This set of management and environmental conditions unique to each field and growing season is sometimes referred to as a microenvironment.¹²⁸ Just as every person's fingerprint is unique, each field's microenvironment is unique, making predictions of crop performance extremely difficult, if not impossible. A few of the more significant individual management and environmental factors affecting crop production are explained below.

A. *Planting Date*

Planting date can have a significant and unpredictable impact on crop performance, especially in years where the crop endures periods of significant environmental stress, such as abnormally hot or cool temperatures or abnormally high or low rainfall.¹²⁹ Because crop susceptibility to stress varies with development stage, earlier or later planted fields may perform very differently depending upon the development stage each was in during the period environmental stress occurred.¹³⁰

For example, later planted fields may escape early season chilling or frost injury and avoid cool season disease infections but can reach vulnerable reproductive stages of growth when temperatures can be high and moisture limited.¹³¹ On the other hand, earlier planted fields may be susceptible to early season chilling or frost injury and cool season disease infections but may complete reproductive stages of growth prior to periods with high temperatures and limited moisture.¹³²

S.E.2d 361, 366 (N.C. Ct. App. 1976) (upholding disclaimer clause given inherent element of risk present in all agricultural enterprises).

126. See Defs.' Opp'n to Mot. for Class Certification at 4-5, *Byone v. Monsanto Co.*, No. 99-1277A, slip op., (W.D. La. Apr. 26, 2000) (on file with author) [hereinafter Defs.' Opp'n to Mot. for Class Certification].

127. See *id.*

128. See *id.* at 5.

129. See *id.*

130. See *id.*

131. See Iowa State University, *Planting Date and Soybean Diseases* (visited Feb. 28, 2001) <<http://www.ipm.iastate.edu/ipm/icm/1998/4-20-1998/psoydis.htm>> [hereinafter *Planting Date and Soybean Diseases 1998*]; Iowa State University, *Soybean Planting Date in 2000* (visited Feb. 28, 2001) <<http://www.ipm.iastate.edu/ipm/icm/2000/4-24-2000/plantdate2000.htm>> [hereinafter *Soybean Planting Date in 2000*]; *Soybean Planting Date When and Why* (visited Feb. 28, 2001) <<http://www.ianr.unl.edu/pubs/fieldcrops/g687.htm>> [hereinafter *Soybean Planting Date When and Why*].

132. See *Planting Date and Soybean Diseases 1998*, *supra* note 131; *Soybean Planting Date in 2000*, *supra* note 131; *Soybean Planting Date When and Why*, *supra* note 131.

B. *Seeding Rate*

Seeding rate and planting depth directly affect performance because the final surviving plant population is often dependent upon these factors.¹³³ Relatively high or low plant populations can be advantageous depending on the season and numerous management factors.¹³⁴ High populations can be advantageous if nutrient and moisture availability is not limited, but can be inferior to lower populations in fields where nutrients and moisture are limited.¹³⁵ Different varieties or hybrids may respond quite differently to variable seeding rates and subsequent management practices and environmental conditions.¹³⁶ Relatively shallow or deep planting can be advantageous depending upon soil temperatures and moisture conditions at planting through crop emergence.¹³⁷

C. *Soil Texture, Drainage, and Aeration*

Soil texture, drainage, and aeration impact root penetration and access to nutrients and moisture.¹³⁸ Limited access to nutrients and moisture can negatively impact all plant functions.¹³⁹ Poor drainage and aeration can significantly impact crop performance, particularly during periods of higher rainfall.¹⁴⁰

D. *Nematodes*

Nematodes can reduce a plant's ability to extract water and nutrients from the soil by damaging roots, which can hinder crop development and reduce yield.¹⁴¹

133. See Defs' Opp'n to Mot. For Class Certification, *supra* note 126, at 5.

134. See *id.*

135. See, e.g., National Alfalfa Information System, *Seeding Rate* (visited Feb. 28, 2001) <<http://forages.orst.edu/IS/NAIS/main.cfm?PageID=100>> [hereinafter *Seeding Rate*].

136. See, e.g., *id.* (discussing the effect of seeding rate on alfalfa plants); Alberta Barley Commission, *Seeding Rate and Depth Significantly Affect Direct Seeded Barley* (visited Feb. 28, 2001) <http://www.albertabarley.com/newpage/pub...ley_country/feature/spring_2000_003.htm> (discussing the effect of seeding rate on barley plants); *Date of Seeding, Seed Rate and Row Spacing For Irrigated Flax* (visited Feb. 28, 2001) <<http://agr.ca/pfra/sidcpub/sidcft5.htm>>; G.P. Lafond et al., *The Effects of Row Spacing, Seeding Rate and Seed-placed P on Wheat and Barley* (visited Feb. 28, 2001) <<http://paridss.usask.ca/factbook/new97/LAFOND3.htm>>; *Planting Date & Row Width* (visited Feb. 28, 2001) <<http://www.plantpath.wisc.edu/soyheath/bsrdate.htm>> (discussing the effect of planting date and row width on soybean productivity).

137. See, e.g., *Seeding Rate*, *supra* note 135.

138. See Defs' Opp'n to Mot. for Class Certification, *supra* note 126, at 5.

139. See Rod Smith, *Improving Soil* (visited Feb. 28, 2001) <<http://home.integrityonline.com/rodsgarden/improvingsoil.htm>>.

140. See *id.*

141. See Defs' Opp'n to Mot. for Class Certification, *supra* note 126, at 5.

E. *Plant Diseases*

A variety of infectious fungal, viral, or bacterial plant diseases may infect plants anytime from seed germination through harvest.¹⁴² Diseases may have little to no impact or can significantly reduce yield or quality, or cause complete plant death.¹⁴³ The presence and severity of any disease is dependent upon numerous factors, especially environmental conditions.¹⁴⁴ Multiple diseases may affect the same crop in the same season and environmental stress in conjunction with diseases and other factors can compound the impact on the crop.¹⁴⁵ Some common diseases that affect various crops include anthracnose, fusarium, rhizoctonia, phytophthora, pythium, blights, rusts, ergot, molds, wilts, and mosaic diseases.¹⁴⁶

F. *Weed Management*

Weed management decisions can greatly impact the yield of the crop.¹⁴⁷ The choices and combinations of cultural, biological, or chemical weed control practices affect the overall effectiveness of a weed management program, the competitiveness of the crop with the weeds, and the ultimate yield and quality of the crop.¹⁴⁸ Herbicide choices and rates can affect not only the weed population and competitiveness, but also may dramatically impact crop vigor, development, and response to subsequent environmental conditions.¹⁴⁹

G. *Insect Management*

Insect management decisions are equally important to crop performance.¹⁵⁰ Just as in weed management, the choices and combinations of cultural, biological, or chemical control practices affect the overall level of protection from insect damage afforded to the

142. *See id.*

143. *See id.*

144. *See* Iowa State University, *Disease Resistance and Crop Rotation* (visited Feb. 28, 2001) <<http://www.ipm.iastate.edu/ipm/icm/1996/1-26-1996/disres.htm>>; Iowa State University, *Minimizing Disease with Planting Dates* (visited Feb. 28, 2001) <<http://www.ipm.iastate.edu/ipm/icm/1997/4-28-1997/mindisease.htm>>; Iowa State University, *Planting Dates and Soybean Diseases* (visited Feb. 28, 2001) <<http://www.ipm.iastate.edu/ipm/icm/1996/4-22-1996/plantsoydate.htm>> [hereinafter *Planting Dates and Soybean Diseases 1996*]; Iowa State University, *Soil Texture and Disease Risk* (visited Feb. 28, 2001) <<http://www.ipm.iastate.edu/ipm/icm/1999/4-26-1999/soiltext.htm>>.

145. *See* Defs.' Opp'n to Mot. for Class Certification, *supra* note 126, at 5. *See also* *Planting Dates and Soybean Diseases 1996*, *supra* note 144.

146. *See* Defs.' Opp'n to Mot. for Class Certification, *supra* note 126, at 5. *See also* Iowa State University, *Complex Plant Diseases Index* (visited Feb. 28, 2001) <<http://www.ipm.iastate.edu/ipm/icm/indices/plantdiseases.htm>>.

147. *See* Defs.' Opp'n to Mot. for Class Certification, *supra* note 126, at 5.

148. *See id.*

149. *See id.*

150. *See id.*

crop and the ultimate yield and quality of the crop.¹⁵¹ The combination of numerous insect pests that may infest a crop and severity of the respective infestations varies dramatically between years and fields.¹⁵² Crop development and yield can be reduced dramatically.¹⁵³ The time of detection and response to these damaging pests can dramatically impact the ultimate yield and quality of the crop.¹⁵⁴

H. *Weather Conditions*

Weather conditions encountered during the season affect a crop in a multitude of interacting ways.¹⁵⁵ Periods of higher than normal heat can be positively or negatively correlated with crop performance, depending on what stage of growth the crop is in at the time and how available moisture is to the crop.¹⁵⁶

I. *Rainfall*

Rainfall amounts, timing, and duration dramatically impact crop development depending on the time of the season.¹⁵⁷ The crop is generally more resilient to excessive moisture in the mid-to-late season than during the early season.¹⁵⁸ Moisture availability can be too high or low depending on what stage of growth the crop is in at the time and the coinciding temperatures.¹⁵⁹ Irrigation, soil texture, and drainage capacity all interact with natural rainfall to ultimately determine how much moisture is available to the crop at any point in its development.¹⁶⁰

J. *Soil Fertility*

Soil fertility levels interact with crop development, moisture availability, weed and insect complex, and season length to modify crop maturity and yield.¹⁶¹ Nutrient

151. *See id.* *See also* Iowa State University, *Managing Seed-Attacking Insects* (visited Feb. 28, 2001) <<http://www.ipm.iastate.edu/ipm/icm/1993/4-30-1993/seedatak.htm>>; Iowa State University, *Site-Specific Soybean Insect Management: Benefits and Barriers* (visited Feb. 28, 2001) <<http://www.ipm.iastate.edu/ipm/icm/1999/5-5-1999/sitesoyman.htm>> [hereinafter *Site-Specific Soybean Insect Management*].

152. *See Common Pests* (visited Feb. 28, 2001) <<http://www.ctic.purdue.edu/Core4/CT/Checklist/Page20.htm>>; Iowa State University, *Insect Odds and Ends* (visited Feb. 28, 2001) <<http://www.ipm.iastate.edu/ipm/icm/1998/5-25-1998/oddend.htm>>; *Site-Specific Soybean Insect Management*, *supra* note 151.

153. *See* Defs.' Opp'n to Mot. for Class Certification, *supra* note 126, at 6.

154. *See id.*

155. *See id.*

156. *See id.*

157. *See id.*

158. *See id.*

159. *See id.*

160. *See e.g.*, Smith, *supra* note 139 (discussing soil components and quality and its effect on plants).

161. *See* Defs.' Opp'n to Mot. for Class Certification, *supra* note 126, at 6.

availability monitoring and management programs dramatically affect crop productivity.¹⁶²

IV. A CASE STUDY OF AN ATTEMPTED AGRICULTURAL PRODUCTS CLASS ACTION: *BYONE V. MONSANTO CO.*

In what appears to be the first genetically modified agricultural product case to reach the class certification stage, Chief Judge F. A. Little, Jr. of the United States District Court for the Western District of Louisiana recently denied certification of a purported nationwide class of soybean growers.¹⁶³ The *Byone* case involved claims against Monsanto Company and seed company defendants that herbicide tolerant transgenic technology inserted in soybean seeds caused a loss in yield.¹⁶⁴ The court rejected the attempted class action and held that because the production of a soybean crop is so individualized in nature, the plaintiffs could not meet their burden of showing that the transgenic technology at issue caused crop loss on a class-wide basis.¹⁶⁵

The soybean seeds at issue contained a patented gene technology known as Roundup Ready®.¹⁶⁶ Monsanto developed the Roundup Ready® gene for certain agricultural products including soybean seed.¹⁶⁷ Roundup Ready® is a transgenic trait that is placed into hundreds of different varieties of soybean seed.¹⁶⁸ The gene technology in the seed causes soybean plants to be tolerant of the effects of Roundup herbicide when applied in conformity with label instructions, allowing growers to apply Roundup herbicide on or around soybean plants without damaging them.¹⁶⁹ Roundup Ready® technology is intended to provide cost-effective and safe weed control to growers by eliminating the use of residual herbicides and tank mixes of herbicides.¹⁷⁰

Monsanto licenses its gene technology to many different seed companies, which in turn incorporate the gene technology in many different soybean varieties.¹⁷¹ After inserting the gene technology into different varieties of seed, the seed companies then package and sell the resulting Roundup Ready® soybean seed.¹⁷² In order to properly use Monsanto's patented technology in soybean seeds, each grower purchasing Roundup

162. See, e.g., Herbert Koepf, *Soil Fertility in Ecological Agriculture* (visited Feb. 28, 2001) <<http://www.eap.mcgill.ca/MagRack/SF/Summer%2091%20K.htm>>; Smith, *supra* note 139; *Soil Fertility in Agricultural Systems* (visited Feb. 28, 2001) <<http://www.msu.edu/user/dunnjef1/rd491/fertie.htm>>.

163. See *Byone v. Monsanto Co.*, No. 99-1277A, slip op. at 1 (W.D. La. Apr. 26, 2000).

164. See *id.* at 2.

165. See *id.* at 12.

166. See *id.* at 2.

167. See *id.* at 1-2.

168. See *id.*

169. See *id.* at 1.

170. See *Roundup Ready Features & Benefits* (visited Feb. 14, 2001) <<http://www.roundupready.com/soybeans/rfeatures.htm>>.

171. See *Byone*, No. 99-1277A, at 1-2.

172. See *id.*

Ready® soybean seed must enter into a license agreement with Monsanto.¹⁷³ Thousands of farmers have such licenses with Monsanto.¹⁷⁴

The named plaintiffs brought the class action on behalf of all soybean seed growers in the country who purchased soybean seeds in 1997 and 1998 that contained the Roundup Ready® gene technology.¹⁷⁵ The plaintiffs alleged that Monsanto and the other seed company defendants falsely advertised the yield performance of Roundup Ready® soybean seed for the 1997 and 1998 crop seasons.¹⁷⁶ Plaintiffs claimed that the Roundup Ready® technology inserted in the seed reduced their crop yields.¹⁷⁷

Plaintiffs sought class certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure.¹⁷⁸ In their filings seeking class certification, the plaintiffs asserted that a common nucleus of operative fact was demonstrated by the use of the same gene in all soybean seeds, the use of the same licensing agreement among all soybean growers, the use of the same advertising materials, the alleged failure of the Roundup Ready® seed to perform as advertised, and Monsanto's alleged failure to disclose the risks associated with using the seeds.¹⁷⁹

The court focused its analysis on the predominance and superiority requirements of Rule 23(b)(3).¹⁸⁰ At the outset of its predominance analysis, the court recognized that the "critical inquiry" in the case was whether the Roundup Ready® genetic traits actually caused the plaintiffs' crop losses.¹⁸¹ According to Judge Little, to find the defendants liable under this inquiry, the plaintiffs would have to prove that the Roundup Ready® trait, and not environmental factors, caused reduction in their yields.¹⁸²

The court held that common issues of fact did not predominate.¹⁸³ The court found that there were a multitude of possible factors that could contribute to yield reduction, such as planting conditions, soil conditions, weather conditions, drainage problems, plant diseases, and weed and insect management.¹⁸⁴ The court concluded that these factors "individualized" each potential class member's claim.¹⁸⁵ The multitude of individual factors also made it "extremely difficult" to ascertain the precise cause of the plaintiffs' crop losses.¹⁸⁶ Consequently, the plaintiffs failed the "critical inquiry" test

173. See The Abundant Life Seed Foundation, *Are You Ready for "Roundup Ready"?*, SEED MIDDEN #47 (Summer 1997) <<http://csf.colorado.edu/perma/abundant/summer97.htm>>; *Roundup Ready* (visited Feb. 14, 2001) <<http://interstateseed.com/agronomy/Tech%20Talk%20Corn%20October%209,%202000.htm>>.

174. See *Byone*, No. 99-1277A, at 2, n.1.

175. See *id.* at 4.

176. See *id.* at 4-5.

177. See *id.* at 4.

178. See *id.* at 3-4.

179. See *id.* at 10-11.

180. See *id.* at 9-13.

181. See *id.* at 11.

182. See *id.*

183. See *id.* at 11-12.

184. See *id.*

185. See *id.* at 12.

186. See *id.*

because they could not prove that Roundup Ready® technology caused the alleged crop loss.¹⁸⁷

Another significant aspect of the *Byone* court's ruling on predominance was the recognition that the defendants were entitled to challenge the claims brought against them on an individual basis.¹⁸⁸ The court opined that the defendants' rights to assert affirmative defenses on each claim would make class action treatment extremely burdensome because the defenses asserted depended on facts peculiar to each class member's case.¹⁸⁹ For example, each claimant would have faced evidence at trial of environmental factors and of the myriad of discrete cultivation practices employed by each grower that could have affected yields negatively.¹⁹⁰ Because the number and significance of individual defenses would have overwhelmed any common issues, predominance was defeated on this basis as well.¹⁹¹

The *Byone* court also rejected class certification on the basis of superiority.¹⁹² Addressing superiority in a bifurcated manner, the court first found that because damages incurred by prospective class members were large, a class action was not a superior method of adjudication.¹⁹³ According to the court, the presence of many small claims is the "most compelling reason for finding class action superiority."¹⁹⁴ This element was absent in *Byone*.¹⁹⁵ Second, the court rejected the plaintiffs' contention that handling the case as a class action would be in the interest of judicial efficiency.¹⁹⁶ The court noted that the plaintiffs presented no evidence, and the court could find none, of a surge of Roundup Ready® soybean seed court filings.¹⁹⁷ On this issue, the court concluded that "a theoretical judicial crisis is not grounds for class certification."¹⁹⁸

V. CONCLUSION

The *Byone* decision clearly shows the extreme difficulty of certifying agricultural products cases as class actions.¹⁹⁹ This extreme difficulty should not come as a surprise. Agricultural products cases are very fact specific and tend to involve large damage claims, and the class action device is not all encompassing. The class action is a procedural device intended to advance judicial economy by trying claims together that are

187. *See id.*
188. *See id.*
189. *See id.*
190. *See id.* at 12-13.
191. *See id.*
192. *See id.* at 13.
193. *See id.* at 13-14.
194. *Id.* at 13.
195. *See id.*
196. *See id.* at 14-15.
197. *See id.* at 14.
198. *See id.*
199. *See id.* at 9-15.

sufficiently common so as to lend themselves to collective treatment.²⁰⁰ Agricultural products cases simply do not fit the class action mold and consequently should not be handled as class actions.

200. See *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000).