

Fact Sheet

The “Need” for Class Certification

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December 30, 2005

To obtain class certification pursuant to Federal Rule of Civil Procedure Rule 23, the moving party must meet the four prerequisites of Rule 23(a): numerosity, typicality, commonality, and adequacy of representation. At least one subdivision of Rule 23(b) must also be satisfied.

Due to the restrictions imposed by the Supreme Court’s sovereign immunity jurisprudence,¹ it is not uncommon for disability rights litigants to seek only prospective injunctive and declaratory relief against a state official. Thus, their class action cases typically seek certification under Rule 23(b)(2), which applies where the

party opposing the class has acted, or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole....

Fed. R. Civ. P. 23(b)(2).

Defendants have opposed certification of (b)(2) classes with the assertion that the state will comply with any injunction the court should issue. This argument, sometimes called the “necessity doctrine,”² says that class certification is not needed because the relief, if granted, will automatically extend to all affected parties. Certification is a mere formality since the benefits plaintiffs seek would flow to the class members regardless of certification.

While the argument dates back to the 1970s,³ it has been invigorated in recent years and is now being asserted in a wide variety of cases involving, for example, Medicaid cost sharing,⁴

¹ The National Health Law Program has discussed these sovereign immunity issues in previous Fact Sheets for the National Disability Rights Network.

² For additional discussion, *see, e.g.*, Daniel Tenny, Note, *There is Always a Need: The “Necessity Doctrine” and Class Certification Against Government Agencies*, 103 Mich. L. Rev. 1018 (Mar. 2005) (hereinafter *There is Always a Need*).

³ *See, e.g.*, *Dionne v. Bouley*, 757 F.2d 1344, 1355-56 (1st Cir. 1985) (discussing origins of the no-need argument and collecting cases).

OTHER OFFICES

Medicaid due process,⁵ Medicaid Early and Periodic Screening, Diagnosis and Treatment,⁶ the Medicaid nursing home reform act,⁷ Food Stamps,⁸ and the Americans with Disabilities Act.⁹

This Fact Sheet discusses the status of courts' acceptance of the no-need argument, describes problems that are posed by the argument, and offers suggestions for how advocates can avoid its application.

Judicial acceptance of the necessity argument

The "necessity requirement . . . refers to a practice, followed by several circuits, of denying class certification under Rule 23(b)(2), when a class is not needed to obtain the same relief" that the class is requesting.¹⁰ The argument was accepted, early on, by the Second Circuit Court of Appeals.¹¹ It has also been accepted by the Fourth and Tenth Circuits.¹²

Not all courts accept the argument, however, and there is wide variation among the circuits. The Seventh Circuit has expressly rejected the necessity doctrine, stating that "class certification may not be denied on the ground of lack of 'need' if the prerequisites of Rule 23 are met."¹³

⁴ *E.g.* *Spry v. Thompson*, No. 03-121-KI, 2004 WL 1146543, at *5 (D. Or. May 20, 2004) (citing *James v. Ball*, 613 F.2d 180 (9th Cir. 1979), *rev'd on other grounds*, 451 U.S. 355 (1981)).

⁵ *E.g.* *Karen L. ex rel. Jane L. v. Physicians Health Services, Inc.*, 202 F.R.D. 94, 103-04 (D. Conn. 2001); *Dixon v. Quern*, 76 F.R.D. 617, 620 (N.D. Ill. 1977).

⁶ *E.g.* *Dajour B. v. City of New York*, No. 00 Civ. 2044 (JGK), 2001 WL 1173504, at *10 (S.D. N.Y. Oct. 3, 2001).

⁷ *E.g.* *Ottis v. Shalala*, No. 1:92-CV-426, 1993 WL 475518, at *5 (W.D. Mich. Sept. 7, 1993).

⁸ *E.g.* *Aldmendes v. Palmer*, 222 F.R.D. 324, 334 (N.D. Ohio 2004).

⁹ *E.g.* *Duprey v. Connecticut Dept. of Motor Vehicles*, 191 F.R.D. 329, 339-40 (D. Conn. 2000) (regarding parking placards for people with disabilities).

¹⁰ *Dionne*, 757 F.2d at 1355.

¹¹ *See, e.g.*, *Galvan v. Levine*, 490 F.2d 1255 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974).

¹² *See, e.g.*, *Sandford v. R.L. Coleman Realty Co., Inc.*, 573 F.2d 173, 178 (4th Cir. 1978); *Kansas Health Care Ass'n v. Kansas Dept. of Social & Rehab. Servs.*, 31 F.3d 1536, 1548 (10th Cir. 1994).

¹³ *Vergara v. Hampton*, 581 F.2d 1281, 1284 (7th Cir. 1978) (citing *Fujishima v. Bd. of Educ.*, 460 F.2d 1355, 1360 (7th Cir. 1975) and *Vickers v. Trainor*, 546 F.2d 739, 747 (7th Cir. 1976)).

District courts in three other circuits have questioned it.¹⁴ The Fifth Circuit has expressly declined to decide whether “necessity can play a role in class certification decisions.”¹⁵

Moreover, where the no-need argument has been accepted, it has been limited or refined in subsequent applications. For example, the Eighth Circuit has applied the doctrine where the *constitutionality* of a statute was at issue.¹⁶ Significantly, lower courts in the Second Circuit, where the doctrine was seminally described in *Galvan*, have narrowed the circumstances for its application. For example, lower courts have refused to accept the argument where there is a claim for money damages.¹⁷ A recent district court decision, *D.D. v. New York City Board of Education*, suggests four factors to be reviewed to decide if class certification would be “superfluous”:

First, an affirmative statement from the government defendant that it will apply any relief across the board militates against the need for class certification. Second, withdrawal of the challenged action or nonenforcement of the challenged statute militates against the need for class certification. Third, if the relief sought is merely a declaration that a statute or policy is unconstitutional, denial of class certification is more appropriate than where plaintiffs seek complex, affirmative relief. Fourth, class certification is necessary if plaintiffs’ claims are likely to become moot.¹⁸

¹⁴ A District of Columbia court rejected the government’s argument that the class was “unnecessary,” stating that it was “unaware of any case from the Court of Appeals of this Circuit adopting a ‘necessity’ requirement in the Rule 23(b)(2) context.” *Coleman v. Pension Benefit Guar. Corp.*, 196 F.R.D. 193, 200 (D.D.C. 2000). A district court in Pennsylvania has said “the current viability” of the doctrine in the Third Circuit is “far from clear.” *Bacal v. Southeastern Penn. Tranp. Auth.*, No. 94-6497, 1995 WL 299029, at *6 (E.D. Pa. May 16, 1995) (citing cases). Courts of the Sixth Circuit have also questioned the necessity argument. One district court found that the circuit court “has disclaimed any necessity requirement for Rule 23(b)(2) certification.” *Communities for Equity v. Michigan High School Athletic Ass’n*, 192 F.R.D. 568, 575 (W.D. Mich. 1999) (citing *Penland v. Warren Co. Jail*, 797 F.2d 332, 334 (6th Cir. 1986)). *But see* *Craft v. Memphis Light, Gas & Water Div.*, 534 F.2d 684, 686 (6th Cir. 1976) (applying necessity doctrine). *See also Aldmendaras*, 222 F.R.D. at 334 (N.D. Ohio 2004) (limiting *Craft* to a case where plaintiffs are challenging a rule or procedure on its face).

¹⁵ *Pederson v. Louisiana State Univ.* 213 F.3d 858, 867 n.8 (5th Cir. 2000).

¹⁶ *See, e.g., Ihrke v. Northern States Power Co.*, 459 F.2d 566, 572 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972) (accepting the argument in a case seeking declaratory relief on a constitutional claim). *Compare* *Olson v. Reagen*, 631 F. Supp. 154, 157 (S.D. Iowa 1986), *rev’d on other grounds*, 830 F.2d 811 (8th Cir. 1987) (holding in a Medicaid Act case that “the standard for certification under Rule 23(b)(2) is not whether class relief is necessary, but whether such relief is appropriate.”).

¹⁷ *See, e.g., Duprey*, 191 F.R.D. at 339 (holding in an Americans with Disabilities Act challenge to fees charged by the state for handicapped parking placards that the necessity doctrine “does not apply to cases where there is a claim for monetary damages in addition to a request for injunctive and declaratory relief, as in the instant case.”).

¹⁸ *D.D. ex rel. V.D. v. New York City Bd. of Educ.*, No. CV-03-2489, 2004 WL 633222, at *14 (E.D. N.Y. Mar. 30, 2004) (citations omitted). *See also, e.g., Connecticut State Dept. of*

The need to respond to the no-need argument

The necessity argument should be aggressively disputed at the district court level “as it would effectively render Rule 23(b)(2)’s procedures obsolete in actions for injunctive relief, at least where a government agency is a defendant.”¹⁹ “[T]he idea that a class may be certified only if ‘necessary’ flies in the face of the Federal Rules.”²⁰ As noted by the Advisory Committee Notes, Rule 23(b)(2) is

intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class a whole, is appropriate. . . . The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. . . . Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class. . .

²¹

Newberg on Class Actions confirms, “A need requirement finds no support in Rule 23 and, if applied, would entirely negate any proper class certifications under Rule 23(b), a result hardly intended by the Rules Advisory Committee.”²² Moreover, in *Califano v. Yamasaki*, the U.S. Supreme Court held that a class can be certified under (b)(2) even if the plaintiffs have other avenues of relief available to them and there is no absolute need for a class action.²³

Social Servs. v. Shalala, No. 3:99 CV 2020, 2000 WL 436616, at *2 (D. Conn. Feb. 28, 2000) (stating that when a mandatory, as opposed to a prohibitory, injunction is sought, *Galvan* is inapplicable). *See also, e.g., Communities for Equity*, 192 F.R.D. at 575 (stating that even if there were a “necessity requirement” in (b)(2), “mootness concerns would suggest the necessity of certification”).

¹⁹ *Coleman*, 196 F.R.D. 199-200 (D.D.C. 2000) (citation omitted).

²⁰ *Littlewolf v. Hodel*, 681 F. Supp. 929, 937 (D.D.C. 1988) (“Were class certification inappropriate if ‘unnecessary,’ it would be inappropriate whenever only injunctive relief is sought, as the proposed relief would apply to all person, whether class members or not.”); *see also Langner v. Brown*, No. 95 Civ. 1981, 1996 WL 709757, at *8 (S.D. N.Y. Dec. 10, 1996) (citing *Littlewolf* and stating, “To adopt this reasoning would be to conclude that class actions are unwarranted when seeking injunctive relief, which would leave 23(b)(2) devoid of meaning.”).

²¹ Fed. R. Civ. P. Rule 23 (Committee Note of 1966 Revision). *See also* James Wm. Moore, 5 *Moore’s Federal Practice* 3d § 23.43 (2005) (noting that (b)(2) was promulgated “essentially as a tool for facilitating civil rights actions” and illustrating with cases involving discrimination, government benefits, and due process).

²² 1 Herbert B. Newberg and Alba Conte, *Newberg on Class Actions* §4.19, at 4-70 (3d ed. 1992).

²³ 442 U.S. 682, 700 (1979). *See Ottis*, 1993 WL 475518, at *5 (discussing *Yamasaki* and noting that the “mere fact that class certification may not be a ‘superior’ way in which to handle this case, is not an appropriate basis for denying certification of a Rule 23(b)(2) case”).

Indeed, it is imperative for litigants to offer a well-organized response to the necessity argument at the district court level. Whether to certify a class is within the discretion of the district court. The court of appeals will not reverse the district court absent an abuse of discretion.²⁴

Advocacy tips

When developing a litigation plan, do not automatically assume that a motion for class certification will be filed. Consider other avenues. For example, assess whether the entire dispute can be resolved through a simple declaration of the rights of the parties.

If class certification is appropriate, consider the following suggestions. First, move for class certification as quickly as possible. Second, consider whether the defendant will stipulate that any relief will be applied broadly—an action that could lead to the class motion being withdrawn.

If a motion for class certification is filed and the no-need argument raised in response, consider the following points in your reply:

- Do not refer to the argument as the “necessity requirement” or “necessity doctrine,” even if the defendant’s papers do. Such labeling “suggests some kind of mechanical classification, whereas the justification for denying class certification rests on the particular circumstances.”²⁵
- Point out that acceptance of the argument “flies in the face” of the purpose of Rule 23(b)(2). It will make Rule 23(b)(2) classes “obsolete” in cases where the plaintiffs are suing state officials and seeking only prospective injunctive and declaratory relief—which, by the laws of sovereign immunity, includes most cases involving public benefits and many discrimination cases.
- Note that while the “doctrine” was announced in the 1970s, its continued viability is uncertain. “[F]or every class denial on the basis of lack of need, one is able to find a decision, or several decisions, often in the same circuit, where other courts have certified Rule 23(b)(2) classes under virtually the same circumstances.”²⁶
- The limiting factors noted by the courts should be reviewed:
 - (1) Has the defendant state official made the necessary *affirmative statements* or taken *affirmative actions* to apply relief across the board? Has the defendant state official actually *withdrawn the challenged action or taken affirmative action to be bound* (e.g.

²⁴ See, e.g., *Dionne*, 757 F.2d at 1355-56.

²⁵ *Id.* at 1356.

²⁶ *Newberg on Class Actions*, *supra* n. 22, §4.19, at 4-62 (collecting cases).

by officially withdrawing the challenged action or affirmatively agreeing to be bound in testimony in the record or in proffered stipulation)?²⁷

(2) Is the plaintiff seeking *affirmative relief* in addition to prohibitory relief (e.g. by requesting an affirmative injunction based on the violation of a federal statute or asking that the plaintiff class be notified of steps to take to obtain relief from the defendant's earlier conduct)?²⁸

(3) Is there the potential for *mootness* of the plaintiffs' claims?²⁹

(4) Is there a claim for *monetary damages*?³⁰

- If the defendant is opposing class certification on one or more Rule 23(a) grounds, for example arguing that the class lacks commonality, this weighs against denial of class certification on the basis that it is a mere formality.³¹

²⁷ See, e.g., *Karen L.*, 202 F.R.D. at 105 (certifying class of Medicaid recipients where the defendant had not taken any “tangible and identifiable steps to redress the harms the plaintiffs attacked”) (citation omitted); *Wilson-Coker v. Shalala*, No. 3:00CV1312 (CFD), 2001 WL 930770, at *5 (D. Conn. 2001) (same, with state official seeking class); *Jane B. v. New York City Dept. of Social Servs.*, 117 F.R.D. 64 (S.D. N.Y. 1987) (distinguishing *Galvan* on grounds that the plaintiffs were seeking relief “that would require defendants to take affirmative steps to remedy existing unconstitutional conditions . . . and to implement standards that comport with the mandates of federal and state laws and regulations.”). In *Catanzano v. Dowling*, 847 F. Supp. 1070, 1079 (W.D. N.Y. 1994), *aff'd in part and vacated in part on other grounds sub nom. Catanzano v. Wing*, 103 F.3d 223 (2d Cir. 1996) (“Positive assurance regarding future compliance with the injunction as to other class members is required”; refusing to accept assurances contained in summary judgment briefing and certifying class absent more definite assurance by stipulation, discussion on the record, or letter).

²⁸ See, e.g., *Karen L.*, 202 F.R.D. at 103-04 (collecting cases and rejecting “necessity doctrine” where plaintiffs sought mandatory, rather than prohibitory, relief). Compare *Dionne*, 757 F.2d at 1355-56 (“Insofar as the relief sought is prohibitory, an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality. . . .”).

²⁹ See, e.g., *Johnson v. City of Opelousas*, 658 F.2d 1065, 1070 (5th Cir. 1981) (“Certification of a class under Rule 23(b)(2) is especially appropriate where, as here, the claims of the members of the class may become moot as the case progresses.”) (citation omitted); *Ottis*, 1993 WL 475518, at *5 (noting all plaintiffs in a Medicaid case were elderly and ill, and certification was “especially appropriate where, as here, the claims of the class may become moot as the case progresses”) (citation omitted); see also *Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 391-92 (S.D. N.Y. 2000) (certifying class and discussing mootness in Medicaid and Food Stamp case).

³⁰ See, e.g., *Bellas v. CBS, Inc.*, 201 F.R.D. 411, 416-18 (W.D. Penn. 2000) (collecting cases and finding doctrine does not apply where there is a claim for monetary damages).

³¹ For a case making this point, see *Duprey*, 191 F.R.D. at 339.

- Point out that the argument is inconsistent with Rule 23, which intends for the court to control relief where a class exists and depends on adequate counsel monitoring and enforcing the case, not the defendant.
- Point out that the defendant's argument should be viewed skeptically because she is taking inconsistent positions, seeking to restrict relief with the argument but also agreeing to widely apply the relief with the argument. Moreover, future enforcement across the class will depend on the defendant, who is opposing the plaintiffs' right to broad relief. Future enforcement will depend on the good will of the defendant, and state defendants frequently change.³²
- Remind the court that if the no need argument is accepted and the defendant does not comply in the future, enforcement can only occur through the individual named plaintiffs, who may no longer have standing. Thus, a new case will need to be filed, because individuals who are not parties will not be able to invoke the judgment. Future enforcement thus becomes murky, especially where the plaintiff class has limited resources and are faced with disabling conditions.

³² For in-depth discussion, see Tenny, *There is Always a Need*, *supra* n. 2.