

LITIGATION

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Want to Certify A Class Action?

Since 2003, Rule 23(c)(1)(B) must be applied, and the courts are just beginning to interpret how.

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IN 2003, Federal Rule of Civil Procedure 23, which governs class actions, underwent substantial amendment. The most significant changes included a newly created subdivision (c)(1)(B), which requires that “an order certifying a class action must define the class and the class claims, issues, or defenses.” Fed. R. Civ. P. 23(c)(1)(B) (emphasis added).

In a matter of first impression, the U.S. Court of Appeals for the Third Circuit recently determined the steps a federal district court must take to comply with Rule 23(c)(1)(B) when certifying a class action. The Third Circuit’s decision in *Wachtel v. Guardian Life Ins. Co. of Am.*, issued in June of this year, interprets Rule 23’s new language to require that a district court’s certification order, or incorporated opinion, include “a readily discernible, clear, and complete list of the claims, issues, or defenses to be treated on a class basis.” 453 F.3d 179, 187-88 (3d Cir. 2006).

In *Wachtel*, the defendants, providers of health benefit plans in various states, appealed the order of the U.S. District Court for the District of New Jersey certifying two nationwide classes in *Wachtel v. Guardian Life Ins. Co.* and *McCoy v. Health Net, Inc.* Id. at 182. The plaintiffs, members of the health benefit plans, alleged that the defendants violated the Employee Retirement Income Security Act (ERISA) by failing to properly reimburse them for out-of-network claims. Id. at 182-83.

The Third Circuit found that the district court’s certification order and accompanying memorandum were “unclear, intermittent, and incomplete, and nothing in the Order evidence[d] an intent to explicitly define which claims, issues, or defenses [we]re to be treated on a class basis for the remainder of the litigation.” Id. at 189. Concluding that the district court failed to meet the substantive requirements of Rule 23(c)(1)(B), the Third Circuit remanded the case to the district court “for a definition of the claims, issues, or defenses to be treated on a class basis.” Id. at 189-90.

While the Third Circuit’s decision merely enforced the already amended language of Rule 23, a number of issues were not addressed or were left undecided. The court, for example, spoke only in general terms about the level of specificity required by Rule 23(c)(1)(B), leaving practitioners and district court judges to



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wonder how much detail is necessary to satisfy a district court's obligation to identify class claims, issues and defenses. Is it sufficient for the certification order to simply include by reference the claims raised in the class action complaint and the defenses set forth in the answer, or must the certification order or accompanying memorandum opinion list each claim and defense to be treated on a class basis?

These issues will undoubtedly be dealt with over time, as practitioners and district court judges learn by trial and error what satisfies the requirements of Rule 23(c)(1)(B). What we do know, however, is that "current practice often falls short" of the standard set by the *Wachtel* court. *Id.* at 184.

Current Practice Isn't Cutting It

While practitioners and courts have gone to great lengths to define putative classes in a clear, complete and prominent manner, treatment of the class claims, issues and defenses has been peripheral at best. See *id.* at 184. The Third Circuit makes clear in *Wachtel* that general discussions of the facts of the case and the allegations in the complaint will not, on their own, satisfy Rule 23(c)(1)(B). *Id.* at 184-85.

Nor will a collateral discussion of the claims, issues and defenses in the context of the court's commonality, typicality or predominance analyses be sufficient. *Id.* at 185. Rather, the Third Circuit has put practitioners on notice that appellate tribunals will be reviewing certification orders to determine "whether the precise parameters defining the class and a complete list of the claims, issues, or defenses to be treated on a class basis are readily discernible from the text either of the certification order itself or of an incorporated memorandum opinion." *Id.*

Moreover, although the *Wachtel* court stated that "no particular format is necessary in order to meet the substantive requirement of the Rule," *id.* at 187 n.10, the best practice going forward, as recommended by the court, will be to include a paragraph in the certification order that, similar to the paragraphs that define the class itself, comprehensively lists the claims, issues or defenses to be treated on a class basis, see *id.* Of course, as the court acknowledged, that task may be difficult in the early, pre-certification stages of a class action, given the "extraordinarily complex factual and legal scenarios" that may exist. *Id.* at 186 n.8.

This difficulty is, to some extent, mitigated by Rule 23(c)(1)(C), which provides that a certification order "may be altered or amended before final judgment." *Id.* at 186 n.8. The utility of subdivision 23(c)(1)(C), however, is substantially diminished when a class is certified in the context of a class action settlement occurring in the preliminary stages of a case. Whether courts and parties will be given any leniency as they attempt to define the class claims, issues and defenses in those circumstances is unclear at this time, as are many other issues left unaddressed by the *Wachtel* court.

The District Courts Adapt

District courts have adapted rapidly to comply with the Third Circuit's guidance.

Within a month of the *Wachtel* decision's filing, the District of New Jersey acknowledged the requirements of Rule 23(c)(1)(B) in *In re Electrical Carbon Products Antitrust Litig.*, MDL No. 1514, 2006 WL 2505881 (Aug. 30, 2006). In that case, the class action complaint alleged that the defendants violated the Sherman Antitrust Act by engaging in "an unlawful conspiracy to fix, raise, maintain, and stabilize the price of, and/or allocate markets and customers for, electrical carbon products in the United States." *Id.* at *1.

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Although the case was before the district court on a motion to approve a stipulated class settlement, the court found that the requirements of Rule 23(c)(1)(B) were equally applicable. *Id.* at *3 n.10. Quoting *Wachtel*, the court stated that its certification order must include

"(1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues, or defenses to be treated on a class basis."

Id. (quoting *Wachtel*, 453 F.3d at 187-88).

With that in mind, the *Electrical Carbon* court purported to include a list of the class claims, issues and defenses to be treated on a class basis. *Id.* That list included:

(a) whether a conspiracy to fix or stabilize prices of Electrical Carbon Products sold in the United States existed during the years 1990-99; (b) what was the scope of such a conspiracy?; (c) what was the efficacy of such a conspiracy?; and (d) when were the contours of such a conspiracy sufficiently known to trigger the commencement of the statute of limitations?

Id.

We cannot say whether this list—which seems to focus on the issues to be treated on a class basis, as opposed to the claims and defenses—satis-

fies the requirements of Rule 23(c)(1)(B) and *Wachtel*. Nevertheless, it evidences a newfound awareness of such requirements by the courts of the Third Circuit.¹

It is unclear at this time how *Wachtel* will be received by other Circuits and district courts therein. However, we have no reason to doubt that the *Wachtel* standard (or something similar) will be adopted by the other federal courts, such that the formal requirements of Rule 23(c)(1)(B) will be integrated into class action practice nationwide. Indeed, *Wachtel* already has been cited favorably by the U.S. District Court for the District of Kansas in *In re Urethane Antitrust Litig.*, in which the plaintiffs alleged that the defendants violated federal antitrust laws by engaging in price fixing. 237 F.R.D. 440, 442-43 (2006).

In *Urethane Antitrust*, the district court stated that Rule 23(c)(1)(B) "requires district courts to include in class certification orders a clear and complete summary of those claims, issues, or defenses subject to class treatment." *Id.* at 445 (quoting *Wachtel*, 453 F.3d at 184). While the plaintiffs' motion for class certification and appointment of class counsel did not address the requirements of Rule 23(c)(1)(B), the parties reached an agreement concerning the claims, issues and defenses subject to class treatment at the class certification hearing, which was held less than a month after the *Wachtel* opinion was filed. *Id.* at 445-46. The district court adopted a hybrid approach to identifying the class claims, issues and defenses, referring generally to those set forth in the parties' pleadings, but also providing examples of each. *Id.* at 446.

Again, we cannot say whether the *Urethane Antitrust* court's approach satisfies the requirements of Rule 23(c)(1)(B) and *Wachtel*, but it does illustrate the effect *Wachtel* is sure to have in federal courts outside the Third Circuit.

Thus, regardless of the jurisdiction, it is necessary for practitioners to begin incorporating the definitions of class claims, issues and defenses in proposed certification orders, in order to avoid the risk of appellate courts overturning them on appeal.

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1. See also *Beck v. Maximus, Inc.*, 457 F.3d 291 (3d Cir. 2006) (reiterating the requirement of Rule 23(c)(1)(B) that trial courts "include in class certification orders a clear and complete summary of those claims, issues, or defenses subject to class treatment") (quoting *Wachtel*, 453 F.3d at 184); *Zeno v. Ford Motor Co., Inc.*, Civil Action No. 05-418, 2006 U.S. Dist. LEXIS 69957, at *32-33 (D.Pa. Sept. 27, 2006) (same); *In re Tellium, Inc. Sec. Litig.*, Civil Action No. 02-5878 (FLW) (D.N.J. Sept. 7, 2006) (in which the district court judge required the addition of extensive language in the Order and Final Judgment, describing and defining the class claims, so as to explicitly take into account the *Wachtel* requirements).