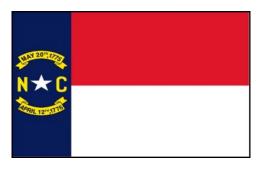








A Guide to North Carolina Class Actions



June, 2013

Anthony T. Lathrop Tonya L. Mercer Jason G. Idilbi



Table of Contents

The Class Action Mechanism	2
North Carolina Rule of Civil Procedure 23 (NC Gen. Stat. § 1A-1, Rule 23)	3
Pleading Requirements for a Class Action	4
The Class Certification Process	5
The Trial Court's Broad Discretion in Class Certification	5
Prerequisites for Class Certification	6
Consideration of the Merits of a Case	9
Analysis of Expert Evidence	10
Certification of Opt-Out Class Actions vs. Non-Opt-Out Class Actions	
Continuing Review of Certification Decisions by the Trial Court	17
Interlocutory Appeals of Certification Decisions	19
Class Action Settlements	22
Award of Attorney's Fees for Class Counsel	24
Recent Federal Decisions Impacting North Carolina Class Actions	28
The Enforceability of Class Arbitration Waivers	28
Federal Jurisdiction Under The Class Action Fairness Act of 2005	29
Recent North Carolina Class Action Decisions	31

The Class Action Mechanism

Why do we have class actions? How are class actions different from regular civil cases?

- Class actions eliminate "repetitious litigation and possible inconsistent adjudications involving common questions, related events, or requests for similar relief." Beroth Oil v. NC DOT, 725 S.E.2d 651, 658 (N.C. Ct. App. 2012) (citing English v. Holden Beach Realty Corp., 41 N.C. App. 1, 9, 254 S.E.2d 223, 230-31 (1979) (citation omitted), overruled on other grounds by Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987)), appeal dismissed by, review granted by Beroth Oil Co. v. N.C. DOT, 2013 N.C. LEXIS 205 (N.C. Mar. 7, 2013).
- There are several inflection points that are unique to a class action lawsuit. For example, the threshold stage of a class action case focuses on whether the case merits certification as a class action. This stage involves unique discovery targeted at the various criteria that must be satisfied, which often requires the presentation of expert evidence and court rulings on evidentiary and other matters. The important distinctions are discussed in greater detail in the following pages.
- Types of class actions that are often filed in North Carolina state courts include:
 - Labor and employment cases, including those arising under the federal Fair Labor Standards Act
 - o Consumer protection
 - o Products liability
 - o Shareholder litigation

North Carolina Rule of Civil Procedure 23 (NC Gen. Stat. § 1A-1, Rule 23)

What rule governs class actions in North Carolina?

- Rule 23 of the North Carolina Rules of Civil Procedure governs class actions in North Carolina.
- Rule 23. Class actions
 - (a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.
 - (b) Secondary action by shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders or members of a corporation or an unincorporated association because the corporation or association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath.
 - (c) Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the judge. In an action under this rule, notice of a proposed dismissal or compromise shall be given to all members of the class in such manner as the judge directs.
 - (d) Tax Class Actions. In addition to all of the requirements set out in this rule, a class action seeking the refund of a State tax paid due to an alleged unconstitutional statute may be brought and maintained only as provided in G.S. 105-241.18. (1967, c. 954, s. 1; 2008-107, s. 28.28(a).)

http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_1A/GS_1A-1, Rule 23.html

- Rule 23 "is based on [its] federal counterpart [] as it existed prior to 1966, when North Carolina adopted a modified version of the Federal Rules of Civil Procedure for state proceedings." <u>Ehrenhaus v. Baker</u>, 717 S.E.2d 9, 17 (N.C. Ct. App. 2011).
- How does North Carolina Rule 23 compare to Federal Rule 23? The Rules were initially identical, as
 the NC Rule was modeled on the Federal Rule. However, Federal Rule 23 has been amended
 substantially, while NC Rule 23 has not.
- Nonetheless, the North Carolina Court of Appeals has stated that case law in the federal courts interpreting Federal Rule 23, although not binding on North Carolina courts, remains instructive even after the Federal amendments. Beroth Oil v. NC DOT, 725 S.E.2d 651 (N.C. Ct. App. 2012), appeal dismissed by, review granted by Beroth Oil Co. v. NC DOT, 2013 N.C. LEXIS 205 (N.C. Mar. 7, 2013). This is so, even though "North Carolina's [Rule 23] . . . is quite different from the present federal Rule 23." Scarvey v. First Fed. Sav. & Loan Ass'n., 146 N.C. App. 33, 41, 552 S.E.2d 655, 660 (2001) (citations omitted).

Pleading Requirements for a Class Action

What must a class action plaintiff allege in its pleadings?

- Two cases collectively set forth the pleading requirements for a class action case <u>Crow v. Citicorp Acceptance Co.</u>, 319 N.C. 274, 354 S.E.2d 459 (1987) and <u>English v. Holden Beach Realty Corp.</u>, 41 N.C. App. 1, 243 S.E.2d 223 (1979).
- A class action plaintiff must allege:
 - 1. The number and make-up of a class comprised of the plaintiff and unnamed others;
 - 2. The plaintiff has a personal interest in an issue of law or fact that is common with the class;
 - 3. The common issue of law or fact predominates over issues affecting only individual class members:
 - 4. The class is so numerous that it would be impracticable to bring all class members before the court; and
 - 5. The plaintiff would adequately represent the members of the class.

The Class Certification Process

The Trial Court's Broad Discretion in Class Certification

How broad is a Trial Court's discretion to certify a class?

- "The trial court has broad discretion in determining whether a case should proceed as a class action."
 <u>Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N.C.</u>, 345 N.C. 683, 699, 483 S.E.2d 422, 432 (1997).
- The trial court is not limited to consideration of matters that are expressly set forth in Rule 23. <u>Crow v. Citicorp Acceptance Co.</u>, 319 N.C. 274, 284, 354 S.E.2d 459, 466 (1987).
- The trial court may consider matters of equity in its discretion. <u>Blitz v. Agean</u>, 197 N.C. App. 296, 301, 677 S.E.2d 1, 5 (N.C. Ct. App. 2009) (citing <u>Maffei v. Alert Cable TV, Inc., 316 N.C. 615, 621, 342 S.E.2d 867, 872 (1986)).</u>
- "Where all the prerequisites are met, it is within the trial court's discretion to determine whether 'a class action is superior to other available methods for the adjudication of th[e] controversy." <u>Harrison v. Wal-Mart Stores, Inc.</u>, 170 N.C. App. 545, 548, 613 S.E.2d 322, 326 (N.C. Ct. App. 2005) (quoting Crow, 319 N.C. at 284, 354 S.E.2d at 466) (alteration in original).
- "The trial court has broad discretion in determining whether class certification is appropriate, however, and is not limited to those prerequisites which have been expressly enunciated in either Rule 23 or in Crow." Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 132, 423 S.E.2d 312, 315 (N.C. Ct. App. 1992).
- "[T]he touchstone for appellate review of a Rule 23 order . . . is to honor the 'broad discretion' allowed the trial court in all matters pertaining to class certification" Frost v. Mazda Motor of Am., 353 N.C. 188, 198, 540 S.E.2d 324, 331 (N.C. 2000).

Prerequisites for Class Certification

What are the prerequisites for class certification?

- The Existence of a "Class"
 - Common Interest in Issue of Law or Fact
 - o Predominance of Common Issue over Individual Issues
- Adequate Representation, Genuine Interest, and No Conflict of Interest
- Numerosity of Class Members
- Notice to Class Members
- Superiority of the Class Action
- The party seeking to bring a class action under Rule 23 has the burden of showing that all of the prerequisites to utilizing the class action procedure are met. <u>Beroth Oil v. NC DOT</u>, 725 S.E.2d 651, 658 (N.C. Ct. App. 2012) (citing <u>Crow v. Citicorp Acceptance Co.</u>, 319 N.C. 274, 282, 354 S.E.2d 459, 465 (1987)), appeal dismissed by, review granted by <u>Beroth Oil Co. v. N.C. DOT</u>, 2013 N.C. LEXIS 205 (N.C. Mar. 7, 2013).
- The Supreme Court has articulated the following as prerequisites for class certification:
 - 1. <u>The Existence of a Class</u>: The named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members.
 - "The predominance requirement is 'the primary issue' upon which courts from other jurisdictions have based their decisions in ruling on motions for class certification." Beroth Oil Co., 725 S.E.2d at 663.
 - "The trial court is justified in denying the motion [for class certification] where the party seeking class certification fails to meet this requirement." Beroth Oil Co., 725 S.E.2d at 664.
 - "[W]hen considering whether questions common to the class will predominate the court may consider how a trial on the merits would be conducted if a class were certified." This evaluation of "how a trial would proceed entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class, a process that ultimately prevents the class from degenerating into a series of individual trials." Blitz v. Agean, 2012 NCBC 20, ¶ 30, 2012 NCBC LEXIS 21, at *10 (N.C. Super. Ct. Apr. 11, 2012) (citation and quotations omitted).
 - "[A] court's attempt at preventing a class action from degenerating into a series of individual trials also requires it to determine whether it is likely that the answers to those common questions will be consistent among class members. A common question is not enough when the answer may vary with each class member and is determinative of whether the member is properly part of the class." Blitz, 2012 NCBC at ¶ 30, 2012 NCBC LEXIS at *10-11 (citations and quotations omitted).
 - "[T]he predominance of individual issues necessary to decide an affirmative defense may preclude class certification." <u>Blitz</u>, 2012 NCBC at ¶ 31, 2012 NCBC LEXIS at *12 (citation and quotation omitted).
 - 2. <u>Adequate Representation</u>: The named representatives must establish that they will fairly and adequately represent the interests of all members of the class;

- In Ehrenhaus v. Baker, 717 S.E.2d 9, 21 (N.C. Ct. App. 2011), the trial court concluded that "Ehrenhuas fairly and adequately represents the interests of the Class because [he] is a Class member with the same legal claims as the other Class members."
- On appeal, the N.C. Court of Appeals rejected appellants' implication that the class representative's ownership of just over one thousand out of over two billion outstanding shares of stock rendered him an inadequate representative: "[O]wning a (relatively) small number of shares is not a bar to a class member serving as class representative." Ehrenhaus, 717 S.E.2d at 21.
- 3. <u>No Conflict of Interest</u>: There must be no conflict of interest between the named representatives and members of the class;
- 4. <u>Genuine Interest</u>: The named representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case;
- 5. <u>Adequate Representation of Out-of-State Plaintiffs</u>: Class representatives within this jurisdiction must adequately represent members outside the state;
 - This will not be an issue when named plaintiffs only seek to represent other plaintiffs that are NC residents. See Ehrenhaus, 717 S.E.2d at 18 ("The class the plaintiffs in the present case seek to represent is defined as including only 'current residents of North Carolina.' Therefore, by definition, there are no class members outside the jurisdiction.").
- 6. <u>Numerosity</u>: Class members must be so numerous that it is impractical to bring them all before the court.
 - It is not necessary to demonstrate the *impossibility* of joining class members. But there must be substantial difficulty or inconvenience in joining all members of the class.
 - "There can be no firm rule for determining when a class is so numerous that joinder of all members is impractical. The number is not dependent upon any arbitrary limit, but rather upon the circumstances of each case." Ehrenhaus, 717 S.E.2d at 18.
- 7. Notice: Adequate notice must be given to all members of the class. Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N.C., 345 N.C. 683, 697, 483 S.E.2d 422, 431 (1997) (quoting Crow, 319 N.C. at 280, 354 S.E.2d at 464) (internal citation omitted).
 - Although <u>Rule 23(a)</u> says nothing about the need for notice to members of the class represented, we believe that fundamental fairness and due process dictate that adequate notice of the class action be given to them. The actual manner and form of the notice is largely within the discretion of the trial court. The trial court may require, among other things, that it review the content of any notice before its dissemination. <u>Ehrenhaus</u>, 717 S.E.2d at 18.
 - The trial court should require that the best notice practical under the circumstances be given
 to class members. Such notice should include individual notice to all members who can be
 identified through reasonable efforts, but it need not comply with the formalities of service of
 process. Notice of the action should be given as soon as possible after the action is
 commenced. As part of the notification, the trial court may require that potential class

members be given an opportunity to request exclusion from the class within a specified time in a manner similar to the current federal practice. <u>Crow</u>, 319 N.C. at 282-84, 354 S.E.2d at 465-66.

- A mere variation in damages among the prospective class plaintiffs is not a bar to class certification. <u>Faulkenbury</u>, 345 N.C. at 698, 483 S.E.2d at 432 (describing differences in amounts of recovery among class members as a "collateral issue"); <u>but see Perry v. Cullipher</u>, 69 N.C. App. 761, 763, 318 S.E.2d 354, 356 (1984) (finding no abuse of discretion in the trial court's denial of class certification where the damages might vary greatly among the parties).
- The final hurdle to class certification is the issue of whether a class action is the superior method of adjudication. This issue arises only when the party seeking class certification has established *all of the* prerequisites for class certification. Crow, 319 N.C. at 284, 354 S.E.2d at 466.
- "Class actions should be permitted where they are likely to serve useful purposes such as preventing
 a multiplicity of suits or inconsistent results. The usefulness of the class action device must be
 balanced, however, against inefficiency or other drawbacks." <u>Crow</u>, 319 N.C. at 284, 354 S.E.2d at
 466.
- Among the potential drawbacks the trial court may consider in its discretion are matters of equity. <u>Crow</u>, 319 N.C. at 284, 354 S.E.2d at 466 (citing <u>Maffei v. Alert Cable TV, Inc.</u>, 316 N.C. 615, 617, 342 S.E.2d 867, 870 (1986)).
- "Among the potential drawbacks the trial court may consider in its discretion are matters of equity," including the fact that "class actions can be used to put greater financial pressure on defendants to settle with the individual plaintiff." Blitz, 2012 NCBC at ¶ 24, 2012 NCBC LEXIS at *7 (citation and quotations omitted).

Consideration of the Merits of a Case

Should a Trial Court Consider the Merits of a Case in Ruling on Class Certification?

- Earlier case law suggested that the trial court should <u>not</u> consider the merits of a case in ruling on class certification.
- In Maffei v. Alert Cable TV, Inc., 75 N.C. App. 473, 477, 331 S.E.2d 188, 192 (N.C. Ct. App. 1985), overruled on other grounds by Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987), the North Carolina Court of Appeals held that the trial court "had no authority to hear the merits of a case in determining whether to certify a class." It held instead that trial courts are limited solely to the procedural criteria relevant to Rule 23 in making a class determination. Id. at 477, 331 S.E.2d at 192. The Court of Appeals in Pitts v. Am. Sec. Ins. Co., 144 N.C. App. 1, 19, 550 S.E.2d 179, 193 (N.C. Ct. App. 2001), held similarly.
- However, the <u>Maffei</u> decision was guided by federal court interpretation of Rule 23 of the Federal Rules of Civil Procedure. At the time of the <u>Maffei</u> decision, federal courts routinely held that Rule 23 of the Federal Rules of Civil Procedure did not allow a trial court to consider the merits of the litigation when making determinations regarding the certification of a class. Id. at 476, 331 S.E.2d at 192.
- Today, however, most if not all federal courts have determined that where a question of suitability for class treatment overlaps with a merits question, federal courts must make a preliminary inquiry into the merits.
- Indeed, the U.S. Supreme Court resolved the confusion on this point in <u>Wal-Mart Stores, Inc. v. Dukes</u>, 131 S. Ct. 2541 (U.S. 2011). Federal courts had been uncertain about whether they could consider merits issues in ruling on certification questions, stemming from pre-<u>Dukes</u> jurisprudence that cut both ways. The <u>Dukes</u> decision banished any notion that courts were barred from considering merits issues during the class certification stage, noting that class certification analyses will frequently "entail some overlap with the merits of the plaintiff's underlying claim." <u>Id.</u> at 2551. The Court freely acknowledged that "proof of commonality necessarily overlaps with [plaintiffs'] merits contentions that Wal-Mart engages in a pattern or practice of discrimination." <u>Id.</u> at 2552. It also noted that proof of both commonality and discrimination required evidence of the reasons for Wal-Mart's challenged employment decisions, and held that plaintiffs had to produce "some glue holding the alleged reasons" for these decisions together to obtain class certification. <u>Id.</u>
- Further, and despite the holdings in <u>Maffei</u> and <u>Pitts</u>, it is clear from a careful review of more recent appellate cases in North Carolina that trial courts consider merits-based arguments during class certification.

Analysis of Expert Evidence

Due to the complex nature of cases that are presented to the courts as putative class actions, parties almost always submit expert evidence in support of or in opposition to motions for class certification. The court will be faced with questions regarding whether the proffered expert evidence should be considered, and to what extent the court should analyze the expert evidence to determine whether class certification is proper. The North Carolina Courts do not appear to have addressed explicitly what level of analysis is to be applied to expert evidence during class certification. However, insight into the proper treatment of expert evidence at this stage of a class action can be gleaned from several cases:

North Carolina Courts

- Despite the lack of an explicit requirement in N.C. Rule Civ. P. 23, a trial court must set forth findings of fact supporting the granting or denial of class certification that are sufficiently specific to allow for effective appellate review. Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 133, 423 S.E.2d 312, 315-16 (1992).
- A trial court's findings of fact with respect to class certification decisions must be supported by "competent evidence." Nobles, 108 N.C. App. at 132, 423 S.E.2d at 315 ("[T]he decision to grant or deny class certification rests within the sound discretion of the trial court....In this regard, an appellate court is bound by the court's findings of fact if they are supported by competent evidence.") (citations omitted).
- Proof of the elements of a cause of action may require "rigorous analysis" of complex evidence (e.g., economic analysis to establish causation and apportion damages in an antitrust action), and the court is expected to navigate the complexities throughout the various stages of a class action. See Teague v. Bayer AG, 195 N.C. App. 18, 28-29, 671 S.E.2d 550, 558 (2009) ("Defendants contend...a rigorous economic analysis would be required to determine whether increased prices were the result of the alleged price fixing or the result of some other factor....Our Court recognized in Hyde that a suit by indirect purchasers under our antitrust laws would be complex. However, fear of complexity is not a sufficient reason to disallow a suit by an indirect purchaser....") (quotations and citations omitted).
- A class action plaintiff's allegation of facts that establish the type of injury for which he is entitled to recover, along with the argument that he will establish damages "through expert testimony using accepted economic analysis," may be sufficient to survive a motion to dismiss; and an assessment of the impact of the evidence proffered by plaintiff on the merits of the case may be appropriate, to some extent, during the class certification process. See Teague, 195 N.C. App. at 27-28, 671 S.E.2d at 557-58 ("What is at issue is Plaintiff's right of access to the courts, not the merits of his allegations. A trial court will be better suited to assess whether Plaintiff will be able to prove causation based on the alleged antitrust violation at the class certification and summary judgment stages.").
- A determination of the admissibility of expert evidence is distinct from the weighing of expert evidence. <u>Howerton v. Aria Helmets, LTD</u>, 358 N.C. 440, 460, 597 S.E.2d 674, 687 (2004) ("we emphasize the fundamental distinction between the admissibility of evidence and its weight, the latter of which is a matter traditionally reserved for the jury.").
- Whether a witness qualifies as an expert is within the discretion of the trial court. <u>Blitz v. Agean, Inc.</u>, 197 N.C. App. 296, 300, 677 S.E.2d 1, 4 (2009).
- Motions to strike expert evidence submitted during class certification may be entertained by the court.
 <u>Blitz v. Xpress Image, Inc.</u>, 2006 NCBC 10, n.1, 2006 NCBC LEXIS 12, n.1 (N.C. Super. Ct. Aug. 23, 2006) (court ruled on defendant's motion to strike affidavit submitted by plaintiff in support of motion for class certification, which was based on grounds that plaintiff did not designate affiant as an expert and affidavit contained incompetent legal opinions).

- A party's failure to designate evidence submitted in support of a motion for class certification as "expert" evidence may be insufficient grounds to strike the proffered evidence. <u>Blitz</u>, 2006 NCBC at n.1, 2006 NCBC LEXIS at n.1 (defendant moved to strike affidavit submitted by plaintiff to support motion for class certification in case alleging violations of the Federal Telephone Consumer Protection Act, 47 U.S.C.S. § 227, because plaintiff did not designate affiant as an expert and affidavit contained incompetent legal opinions; the court denied the motion, but agreed not to consider parts of the affidavit that set out mere legal conclusions regarding the issues).
- In 2004, the North Carolina Supreme Court clarified the standard for determining the admissibility of expert evidence under North Carolina Rule of Evidence 702. The three-part test asks: "(1) whether the expert's proffered method of proof is sufficiently reliable; (2) whether the witness presenting the evidence qualifies as an expert in the applicable area; and (3) whether the testimony is relevant." Howerton, 358 N.C. at 458, 597 S.E.2d at 686 (citing State v. Goode, 341 N.C. 513, 527-29, 461 S.E.2d 631, 369-41 (1995)).
- In determining the reliability of expert evidence under the Howerton standard, the court:

[M]ay look to testimony by an expert specifically relating to the reliability, may take judicial notice, or may use a combination of the two. Initially, the trial court should look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable....when specific precedent justifies recognition of an established scientific theory or technique advanced by an expert, the trial court should favor its admissibility, provided the other requirements of admissibility are likewise satisfied.

Conversely, there are those scientific theories and techniques that have been recognized by this Court as inherently unreliable and thus generally inadmissible as evidence.

Where, however, the trial court is without precedential guidance or faced with novel scientific theories, unestablished techniques, or compelling new perspectives on otherwise settled theories or techniques, a different approach is required. Here, the trial court should generally focus on the following nonexclusive "indices of reliability" to determine whether the expert's proffered scientific or technical method of proof is sufficiently reliable: the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked 'to sacrifice its independence by accepting [the] scientific hypotheses on faith,' and independent research conducted by the expert.

Howerton, 358 N.C. at 459-60, 597 S.E.2d at 687 (citations and quotations omitted).

- "[R]eliability is thus a preliminary, foundational inquiry into the basic methodological adequacy of an
 area of expert testimony. This assessment does not, however, go so far as to require the expert's
 testimony to be proven conclusively reliable or indisputably valid before it can be admitted into
 evidence." Howerton, 358 N.C. at 460, 597 S.E.2d at 687.
- Even if the trial court determines that expert evidence is admissible based on the <u>Howerton</u> three-part test, the "trial court has inherent authority to limit the admissibility of all evidence, including expert testimony, under North Carolina Rule of Evidence 403, which provides that relevant evidence may nonetheless be excluded 'if its probative value is substantially outweighed by the danger of unfair prejudice...." <u>Howerton</u>, 358 N.C. at 462, 597 S.E.2d at 689.

• In 2004, the North Carolina Supreme Court in <u>Howerton</u> explicitly rejected the standard for admissibility of expert evidence that is applied in federal courts based on <u>Daubert v. Merrell Dow Pharmaceuticals</u>, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993):

Long before <u>Daubert</u> was decided, North Carolina had in place a flexible system of assessing the foundational reliability of expert testimony, the practicability of which is evidenced by the case law....Within this system, our trial courts are already vested with broad discretion to limit the admissibility of expert testimony as necessitated by the demands of each case. Requiring a more complicated and demanding rule of law is unnecessary to assist North Carolina trial courts in a procedure which we do not perceive as in need of repair. We therefore expressly reject the federal <u>Daubert</u> standard upon which both the trial court and the Court of Appeals erroneously based their respective rulings. North Carolina is not, nor has it ever been, a <u>Daubert</u> jurisdiction.

358 N.C. at 469, 597 S.E.2d at 692-93.

- Although the North Carolina Supreme Court has rejected the federal standard for the admissibility of evidence set forth in <u>Daubert</u>, North Carolina's Rule of Evidence 702 is now similar to Fed. R. Evid. 702.
- In 2004, when <u>Howerton v. Aria Helmets, LTD</u>, 358 N.C. 440, 597 S.E.2d 674 (2004) was decided, North Carolina Rule of Evidence 702(a) read: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C.G.S. § 8C-1, Rule 702(a) (2003).
- In 2011, North Carolina Rule of Evidence 702 was amended "adopting language similar to the corresponding Federal Rule of Evidence." <u>State v. King</u>, 733 S.E.2d 535, n.2 (N.C. 2012) (citations omitted). Rule 702(a) now reads:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply: (1) The testimony is based upon sufficient facts or data. (2) The testimony is the product of reliable principles and methods. (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C.G.S. § 8C-1, Rule 702 (2011) (emphasis added); 2011 N.C. Sess. Law ch. 283 § 1.3 (effective Oct. 1, 2011).

- The North Carolina Supreme Court has not had occasion to consider whether the test for determining the admissibility of expert evidence has been altered by the 2011 amendment of Rule of Evidence 702. See State v. King, 733 S.E.2d 535, n.2 (N.C. 2012)("We note that the General Assembly has amended Rule 702, adopting language similar to the corresponding Federal Rule of Evidence....Because the case at bar was decided under the earlier version of Rule 702, we need not now consider the impact of those amendments.").
- The North Carolina Court of Appeals, in unpublished opinion, has continued to apply the three-part test set forth in <u>Howerton v. Aria Helmets, LTD</u>, 358 N.C. 440, 597 S.E.2d 674 (2004). <u>See, e.g., In re J.D.O.</u>, 736 S.E.2d 649, 2013 N.C. App. LEXIS 43, *6-7 (N.C. Ct. App. 2013).

Federal Courts

The federal approach to consideration of expert evidence during class certification may be instructive to North Carolina courts. At the federal level, this issue has been explored by several U.S. Circuit Courts of Appeals and the U.S. Supreme Court in its recent decision <u>Comcast v. Behrend</u>, 133 S. Ct. 1426 (2013). The federal courts have wrestled with whether the standard for the admission of expert evidence set forth in <u>Daubert v. Merrell Dow Pharmaceuticals</u>, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) must be applied to evidence at the class certification stage, what depth of inquiry is required by Fed. R. Civ. P. 23's rigorous analysis, and whether it is proper to delve into the merits of expert evidence proffered during class certification.

- Several U.S. Courts of Appeals have taken different stances on the appropriate inquiry into expert evidence proffered at the class certification stage:
- The 7th Circuit required a "full" <u>Daubert review in American Honda Motor Co., Inc. v. Allen</u>, 600 F. 3d 813, 815-16 (7th Cir. 2010) (per curium) (citations omitted):

We hold that when an expert's report or testimony is critical to class certification, as it is here, a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. That is, the district court must perform a full <u>Daubert</u> analysis before certifying the class if the situation warrants. If the challenge is to an individual's qualifications, a court must make that determination 'by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony.' The court must also resolve any challenge to the reliability of information provided by an expert if that information is relevant to establishing any of the Rule 23 requirements for class certification.

• The 8th Circuit held in <u>In re Zurn Pex Plumbing Products Liability Litig.</u>, 644 F.3d 604, 612-13 (8th Cir. 2011) that a "tailored" <u>Daubert</u> analysis is appropriate if it:

[E]xamine[s] the reliability of the expert opinions in light of the available evidence and the purpose for which they were offered.

. . . .

Zurn's desire for an exhaustive and conclusive <u>Daubert</u> inquiry before the completion of merits discovery cannot be reconciled with the inherently preliminary nature of pretrial evidentiary and class certification rulings. The main purpose of <u>Daubert</u> exclusion is to protect juries from being swayed by dubious scientific testimony. That interest is not implicated at the class certification stage where the judge is the decision maker.

• The 11th Circuit in <u>Sher v. Raytheon Co.</u>, 419 Fed. Appx. 887, 890-91 (11th Cir. March 9, 2011)(unpublished) cited the 7th Circuit standard regarding admissibility of expert evidence as persuasive, and went on to rule that the trial court must consider and resolve questions regarding the weight and sufficiency of the expert evidence proffered at class certification:

Here, in its Rule 23 analysis, we find that the district court erred as a matter of law by not sufficiently evaluating and weighing conflicting expert testimony on class certification. It was error for the district court to decline to declare a proverbial, yet tentative winner. The Plaintiffs are required to prove, at the class certification stage, more than just a *prima facie* case, *i.e.*, more than just a "pretty good case."

Here the district court refused to conduct a <u>Daubert</u>-like critique of the proffered experts's qualifications. This was error. As we have noted, a district court must make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification. The district court has not determined facts, from the

often conflicting evidence, sufficient to determine whether class certification is or is not appropriate. The court erred in granting class certification prematurely. "Tough questions must be faced and squarely decided."

The 9th Circuit clarified in <u>Ellis v. Costco Wholesale Corp.</u>, 657 F.3d 970, 982 (9th Cir. 2011) that an
analysis regarding admissibility of expert evidence is not the same as the Rule 23(b) rigorous
analysis required to determine whether class certification is proper. Rigorous analysis requires a
judging of the persuasiveness of the evidence presented:

[T]he district court seems to have confused the <u>Daubert</u> standard it correctly applied to Costco's motions to strike with the "rigorous analysis" standard to be applied when analyzing commonality. Instead of judging the persuasiveness of the evidence presented, the district court seemed to end its analysis of the plaintiffs' evidence after determining such evidence was merely admissible.... Therefore, to the extent the district court limited its analysis of whether there was commonality to a determination of whether Plaintiffs' evidence on that point was admissible, it did so in error.

. . . .

Instead of examining the merits to decide this issue, it appears the district court merely concluded that, because both Plaintiffs' and Costco's evidence was admissible, a finding of commonality was appropriate.

- The U.S. Supreme Court suggested in dicta in <u>Wal-Mart Stores</u>, Inc. v. <u>Dukes</u>, 131 S. Ct. 2541, 2553-54 (2011) that <u>Daubert</u> does apply at the class certification stage: "The District Court concluded that <u>Daubert</u> did not apply to expert testimony at the certification stage of class-action proceedings. 222 F.R.D., at 191. We doubt that is so...."
- The U.S. Supreme Court's review of <u>Comcast v. Behrend</u>, 655 F.3d 182 (3rd Cir. 2011) showed promise to resolve the uncertainties raised by the lower courts regarding the applicability of <u>Daubert</u> at the class certification stage and the depth of analysis courts should apply to expert evidence under Federal Rule of Civil Procedure 23's rigorous analysis. However, after multiple revisions of the question presented for review, the High Court issued a relatively narrow decision in <u>Comcast v. Behrend</u>, 133 S. Ct. 1426 (2013) that analyzes the shortcomings of the particular damages model proposed by the expert in that case. The decision does reiterate, in accordance with <u>Wal-Mart Stores</u>, Inc. v. <u>Dukes</u>, 131 S. Ct. 2541, (2011), that lower courts must delve into the merits of a case to the extent necessary to determine whether certification is proper, even if this means dissecting the parties' expert evidence.
- A petition for Writ of Certiorari was filed seeking review of In re Zurn Pex Plumbing Products Liability Litig., 644 F.3d 604 (8th Cir. 2011) and presenting the following question: "When a party proffers expert testimony in support of or in opposition to a motion for class certification, may the district court rely on the testimony in ruling on the motion without conducting a full and conclusive examination of its admissibility under Federal Rule of Evidence 702 and this Court's decision in <u>Daubert v. Merrell Dow Pharmaceuticals, Inc.</u>, 509 U.S. 579 (1993)?" The petition was dismissed shortly after the Supreme Court's decision in <u>Comcast v. Behrend</u>, 133 S. Ct. 1426 (2013). <u>See Zurn Pex, Inc. v. Cox</u>, 2013 U.S. LEXIS 2737 (U.S. Apr. 11, 2013).

Certification of Opt-Out Class Actions vs. Non-Opt-Out Class Actions

In principle, a class action seeks to avoid repetitious litigation and potential inconsistency in results where there are issues common to the class members or they are seeking similar relief. The result of a class action is binding on all members of the class, including those who have been "absent" or not actively involved in the litigation. Due to the binding nature of the representative class action mechanism, due process requires that class members are provided the right to "opt-out" of a class action, under certain circumstances, to maintain the right to bring a lawsuit on their own. In other circumstances, "non-opt-out" classes may be certified, where the class is mandatory and class members do not have the option of removing themselves from the litigation. North Carolina Rule of Civil Procedure 23 makes no reference to a class member's ability to opt-out or be excluded from a class action. The development of this area of law in North Carolina has been influenced by federal court interpretation of Federal Rule of Civil Procedure 23, which does authorize non-opt-out classes.

- The class action mechanism implicates the fundamental tenet of due process of law provided by the Fourteenth Amendment, which "is the opportunity to be heard." See Ehrenhaus v. Baker, 717 S.E.2d 9, 23 (N.C. Ct. App. 2011) (quoting Grannis v. Ordean, 234 U.S. 385, 394, 34 S. Ct. 779, 58 L. Ed. 1363, 1369 (1914)).
- "When homogeneity exists and the class's interests are aligned, non-opt-out certification does not offend due process. We assume each litigant does not need to be heard individually. But when uniformity is lacking, the class members' interests may not be aligned. Individual class members must be able to opt-out in these situations and exercise their right to be heard." Ehrenhaus, 717 S.E.2d at 23-24.
- In determining whether an opt-out class vs. non-opt-out class may be certified, the Federal Rules of Civil Procedure and federal courts have drawn a distinction between class actions which seek monetary relief and those which seek injunctive or declaratory relief. When a class action seeks solely injunctive or declaratory relief, the certification of a non-opt-out class is proper. However, when a class action seeks solely monetary judgment, the certification of an opt-out class is required. And when a class action seeks both monetary judgment and injunctive or declaratory relief, the analysis is more complicated. The North Carolina courts generally have followed this distinction.
- Fed. R. Civ. P. 23 <u>does not require</u> opt-out rights for class actions certified under Rule 23(b)(2) in which the defendant "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).
- However, Federal Rule 23 does require opt-out rights for classes certified under Rule 23(b)(3) in which "the court finds questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods...." Fed. R. Civ. P. 23(b)(3).
- The U.S. Supreme Court previously held that due process requires class members be given the right to opt-out "when a class action seeks to bind the class members concerning claims 'wholly or predominately for money judgments." <u>Ehrenhaus</u>, 717 S.E.2d at 23 (quoting <u>Phillips Petroleum Co.v. Shutts</u>, 472 U.S. 797, 812 n.3, 105 S. Ct. 2965, 86 L. Ed. 2d, 628, 642 n.3 (1985)).
- "There are numerous federal decisions stating (b)(2) certification is appropriate, even when the action seeks monetary relief, provided the damages sought do not predominate or are incidental to the injunctive relief." Ehrenhaus, 717 S.E.2d at 23 (citations and quotations omitted).

- However, more recently, the U.S. Supreme Court noted that there was a "serious possibility" that the Due Process Clause might require that class members be given the option to opt-out of a class even where monetary claims do not predominate over the injunctive or declaratory relief sought, because "a mere predominance of a proper (b)(2) claim does not cure notice and opt-out problems." Ehrenhaus, 717 S.E.2d at 24 (quoting Wal-Mart Stores v. Dukes, 564 U.S. ____, 131 S. Ct. 2541, 180 L. Ed. 2d. 374, 398 (2011)) (internal quotations omitted).
- The North Carolina Court of Appeals has ruled that the certification of a non-opt-out class is proper in cases seeking injunctive or declaratory relief, based on instructive federal cases:

When the class representative seeks injunctive or declaratory relief, a non-opt-out class is necessary to avoid unnecessary inconsistencies and compromises in future litigation. If a prospective settlement cannot bind all members of the class, the defendant has little motivation to settle....[A] class seeking primarily equitable relief for a common injury is assumed to be a cohesive group with few conflicting interests, giving rise to a presumption that adequate representation alone provides sufficient procedural protection.

Ehrenhaus, 717 S.E.2d at 23 (citations and quotations omitted); See also In re Progress Energy S'holders Litig., 2011 NCBC 44, ¶ 31, 2011 NCBC LEXIS 45, *16 (N.C. Super. Ct. Nov. 29, 2011) (citing Ehrenhaus, 717 S.E.2d 9 for proposition that certification of non-opt-out class was proper in case where equitable claims seeking to enjoin a merger predominated from the outset of litigation).

• The North Carolina Court of Appeals has held that, with respect to class actions seeking both equitable and monetary relief, the U.S. Supreme Court's decision in Dukes instructs courts that they "must be careful--more careful than they have previously been--to protect class members' due process rights when monetary claims are involved," and "the claims pled by the named plaintiff are not the only claims that must be considered. It is critical that courts determine whether it offends due process to preclude monetary claims that are *not* plead as a basis for relief," since collateral estoppel could preclude class members from bringing suit for monetary claims that were not explicitly raised in the class action. Ehrenhaus, 717 S.E.2d at 24.

Continuing Review of Certification Decisions by the Trial Court

The trial court in North Carolina has broad discretion regarding class certification decisions, but the considerations that influence the trial court's decisions may change or develop over the lifetime of a case. The court may be faced with motions to decertify a class or modify a class certification order. The trial court's ability to reconsider or alter a class certification decision before issuing a decision on the merits is a concept that is familiar in federal class actions. However, the North Carolina Rules of Civil Procedure do not make provision for such ongoing review of class certification decisions. The North Carolina courts have determined, however, that class certifications decisions are subject to modification by a Superior Court judge, under certain circumstances.

- The continuing review issue is presented where one judge presides over a case, as well as in cases where multiple judges preside. In the North Carolina system, cases often are handled by different trial judges at different stages of the case. Accordingly, one judge may make a decision on class certification and a different judge may handle other aspects of the litigation. See Ruff v. Parex, Inc., 1999 NCBC 6, ¶ 4, 1999 NCBC LEXIS 6, *3-4 (N.C. Super. Ct. June 17, 1999) (noting that even where cases are designated as "exceptional" under Rule 2.1, decisions on class certification may already have been made).
- Cases that qualify for treatment as complex business cases under N.C. Gen. Stat. § 7A-45.4 can be heard in the North Carolina Business Court, which offers the advantage of having one judge preside over the case from start to finish.
- The trial court is not authorized by North Carolina Rule of Civil Procedure 23 to review and modify a class certification decision. <u>Dublin v. UCR, Inc.</u>, 115 N.C. App. 209, 219, 444 S.E.2d 455, 461 (1994).
- North Carolina Rule of Civil Procedure 23 "contains no provision providing for continuing or subsequent review of [a class certification determination]." Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 131, 423 S.E.2d 312, 315 (1992). In this regard, "[s]ubstantial differences exist between the [North Carolina] rule and its federal counterpart." <u>Dublin</u>, 115 N.C. App. at 219, 444 S.E.2d at 461 (citation omitted).
- Fed. R. Civ. P. 23(c)(1)(C) currently reads: An order that grants or denies class certification may be altered or amended before final judgment. At the time <u>Dublin</u> was decided, section (c)(1) read, in pertinent part: As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.
- "Clearly, the federal rule contemplates continuing review of the class certification status of an action.
 Rule 23 of the North Carolina Rules of Civil Procedure contains no such provision, and [the court] will
 not judicially legislate one." <u>Dublin</u>, 115 N.C. App. at 219, 444 S.E.2d at 461 (citations and quotations
 omitted).
- "The settled rule in North Carolina is that no appeal lies from one superior court judge to another; that one superior court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another superior court judge previously made in the same action." <u>Dublin</u>, 115 N.C. App. at 219, 444 S.E.2d at 461 (quoting <u>Calloway v. Ford Motor Co.</u>, 281 N.C. 496, 189 S.E.2d 484 (1972)).
- "However, in an appropriate context a superior court judge has the power to modify an interlocutory order entered by another superior court judge. Interlocutory orders are subject to change at any time to meet the justice and equity of the case, upon sufficient grounds shown for the same.

Consequently, interlocutory orders are modifiable for changed circumstances." <u>Dublin</u> 115 N.C. App. at 219-20, 444 S.E.2d at 461 (citations and quotations omitted).

- The circumstances underlying a Superior Court judge's class certification decision may change over the time. "Thus, a tension is created between the trial judge's duty to exercise his or her discretion to see that the trial is conducted as fairly, efficiently and effectively as possible and the prohibition against overruling another judge's prior certification order." Ruff, 1999 NCBC at ¶ 4, 1999 NCBC LEXIS at *4.
- Class certification orders are interlocutory and may be modified by a Superior Court judge when there has been a change in circumstances that relate to the legal foundation or basis of the original certification order. <u>Dublin</u>, 115 N.C. App. at 220, 444 S.E.2d at 461; <u>Ruff</u>, 1999 NCBC at ¶¶ 31-33, 1999 NCBC LEXIS at *22-26 (citing Dublin).
- "At least one North Carolina case has said: A Court has broad discretion in deciding whether to allow the maintenance of a class action, and may take account of considerations not expressly dealt with in [rule 23] in reaching a decision." <u>Ruff</u>, 1999 NCBC at ¶ 38, 1999 NCBC LEXIS at *29 (citing <u>English v. Holden Beach Realty Corp.</u>, 41 N.C. App. 1, 254 S.E.2d 223 (1979)) (quotations omitted).
- Citing Newberg on Class Actions, but not North Carolina precedent, the Business Court has noted in a "Caveat" regarding class certification that it has the duty to reconsider class rulings when appropriate:

In this action, the court concludes that occasional and inevitable individual issues, such as the potential discrete liability of a Vester Defendant as to a particular class member, or as to damages of various class members, are outweighed by the interests of efficiency, judicial economy and the ends of justice. However, the parties should bear in mind that it is the duty of the trial court to attempt a fair and reasonable balance of those potentially competing interests; and that it is within the inherent power and authority of the court -- indeed, is the duty of the court -- when appropriate, to reconsider, alter, amend or withdraw class rulings *sua sponte*. This court will undertake to discharge that duty as this action moves forward toward resolution.

Clark v. Alan Vester Auto, 2009 NCBC 17, ¶ 54, 2009 NCBC LEXIS 12, *28-29 (N.C. Super. Ct. July 17, 2009).

Interlocutory Appeals of Certification Decisions

In general, the trial court has broad discretion regarding class certification decisions. The trial court's decision regarding class certification is an interlocutory order, which may be subject to immediate appellate review. However, interlocutory appeals of certification decisions are not always permitted.

Allowance of Interlocutory Appeals

- Immediate appeal of an order <u>denying</u> a request for class certification is generally allowed "on the theory that it affects a substantial right. However...each interlocutory order must be analyzed to determine whether a substantial right is jeopardized by delaying the appeal." <u>Hamilton v. Mortgage Info. Servs.</u>, 711 S.E.2d 185, 193-94 (N.C. Ct. App. 2011) (citation omitted).
- The denial of class certification has been held to affect a substantial right because it determines the
 action as to the unnamed plaintiffs. <u>Frost v. Mazda Motor of Am.</u>, 353 N.C. 188, 193, 540 S.E.2d 324,
 327 (2000).
- An order <u>partially denying</u> class certification may not be immediately appealable because it "does not
 affect a substantial right to the same extent and in the same manner that an order refusing to certify
 any issue for consideration on a class-wide basis does." <u>Hamilton</u>, 711 S.E.2d at 194.
- In cases where a request for class certification is partially granted (and partially denied), a class is
 defined and some issues are certified for consideration on a class-wide basis, and the class
 representative may seek appellate review of the portion of the trial court's order refusing class
 certification on behalf of the proposed class after final judgment. <u>Hamilton</u>, 711 S.E.2d at 194.
- No cases have been presented to the court "holding that an order partially, as opposed to completely, denying class certification affected a substantial right and was, for that reason, appealable on an interlocutory basis." Hamilton, 711 S.E.2d at 194.
- Several North Carolina courts have held that an order granting class certification does not affect a substantial right and interlocutory appeals are not allowed. Stetser v. TAP Pharm. Prods. Inc., 165 N.C. App. 1, 12, 598 S.E.2d 570, 578 (2004) ("defendants argue the trial court's order violates their due process rights and exposes them to multiple trials with possibly conflicting verdicts. Although defendants' arguments differ from those presented in Frost and Faulkenbury, we do not find them persuasive. We hold the trial court's interlocutory class certification order did not affect a substantial right."); Frost, 353 N.C. at 194, 540 S.E.2d at 328 (2000) ("We conclude here as the Court of Appeals did in Faulkenbury that no substantial right is involved in a trial court's determination that a case meets the prerequisites to utilizing a class action as specified in Crow, and that the general rule disallowing interlocutory appeals of such orders applies.").
- However, with respect to the certification of a class in an action against the State government, the
 North Carolina Court of Appeals has held that an order granting certification was immediately
 appealable. See <u>Dunn v. State</u>, 179 N.C. App. 753, 757, 635 S.E.2d 604, 606 (2007) ("this Court has
 repeatedly held that appeals raising issues of governmental or sovereign immunity affect a
 substantial right to warrant immediate appellate review. We thus allow this interlocutory appeal.")
 (citations and quotations omitted).
- A writ of certiorari can be granted by the appellate courts pursuant to North Carolina Rule of Appellate Procedure 21(a)(1), where there is no right to interlocutory appeal. "A writ of certiorari will only be issued upon a showing of appropriate circumstances in a civil case where the right to appeal has

been lost by failure to take timely action or where no right to appeal from an interlocutory order exists." <u>Stetser</u>, 165 N.C. App. at 12, 598 S.E.2d at 578 (2004) (granting writ of certiorari to review order granting class certification where defendants argued the trial court's order violated their due process rights by applying NC law to plaintiff's claims nationwide and exposing them to potentially conflicting verdicts through multiple trials).

Standard of Appellate Review

- "The trial court has broad discretion in determining whether a case should proceed as a class action." Beroth Oil v. NC DOT, 725 S.E.2d 651, 657 (N.C. Ct. App. 2012) (quoting Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N.C., 345 N.C. 683, 699, 483 S.E.2d 422, 432 (1997)), appeal dismissed by, review granted by Beroth Oil Co. v. N.C. DOT, 2013 N.C. LEXIS 205 (N.C. Mar. 7, 2013).
- "[T]he touchstone for appellate review of a Rule 23 order . . . is to honor the 'broad discretion' allowed the trial court in all matters pertaining to class certification" Frost v. Mazda Motor of Am., 353 N.C. 188, 198, 540 S.E.2d 324, 330 (N.C. 2000).
- The appellate court reviews the trial court's decision to deny class certification for abuse of discretion.
 <u>Beroth Oil</u>, 725 S.E.2d at 657 (citing <u>Peverall v. County of Alamance</u>, 184 N.C. App. 88, 91, 645
 S.E.2d 416, 419 (2007); <u>Nobles v. First Carolina Communications</u>, Inc., 108 N.C. App. 127, 132, 423
 S.E.2d 312, 315 (1992)).
- Under an abuse of discretion standard, the appellate court defers to the trial court's discretion "and will reverse its decision 'only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." <u>Beroth Oil</u>, 725 S.E.2d at 657 (quoting <u>Gibbs v. Mayo</u>, 162 N.C. App. 549, 561, 591 S.E.2d 905, 913 (2004)) (citations omitted).
- "An appellate court, however, is noticeably less deferential . . . when [the trial] court has denied class status than when it has certified a class." <u>Blitz v. Agean, Inc.</u>, 197 N.C. App. 296, 300, 677 S.E.2d 1, 4 (2009) (citation and quotations omitted) (ellipsis in original).
- The trial court abuses its discretion with respect to class certification decisions when the decision "(1) rests on an error of law . . . or a clearly erroneous factual finding, or (2) its decision--though not necessarily the product of a legal error or a clearly erroneous factual finding--cannot be located within the range of permissible decisions." Beroth Oil, 725 S.E.2d at 657 (quoting Blitz, 197 N.C. App. at 300, 677 S.E.2d at 4) (citation and quotations omitted) (ellipsis in original).
- "A trial court abuses its discretion when its decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." Ehrenhaus v. Baker, 717 S.E.2d 9, 19 (N.C. Ct. App. 2011) (quoting Frost v. Mazda Motor of Am., Inc., 353 N.C. 188, 199, 540 S.E.2d 324, 331 (2000)) (citations omitted).
- The appellate court reviews issues of law *de novo*, "consider[ing] the matter anew and freely substitutes its own judgment for that of the [trial court]." <u>Beroth Oil</u>, 725 S.E.2d at 657 (quoting <u>In re Appeal of Greens of Pine Glen Ltd.</u>, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).
- The appellate court first reviews de novo the "conclusions of law that informed [the trial court's] decision to deny class certification," and "then turn[s] to the specific facts of the instant case to determine if denial of class certification was proper." <u>Blitz</u>, 197 N.C. App. at 300, 310, 677 S.E.2d at 10 (citations omitted).

- The trial court's findings of fact are binding on appeal if supported by competent evidence. <u>Beroth Oil</u>, 725 S.E.2d at 657 (citing <u>Nobles</u>, 108 N.C. App. at 132, 423 S.E.2d at 315 (1992)).
- Whether a witness qualifies as an expert is within the discretion of the trial court. <u>Blitz</u>, 197 N.C. App. at 300, 677 S.E.2d at 5 (2009).
- Appellate courts review the decision to approve a settlement for abuse of discretion. <u>Ehrenhaus</u>, 717 S.E.2d at 19-20.

Class Action Settlements

Due to the protracted nature of class action litigation, with its attendant burden of costs, class action cases are often settled. Settlement is common after a class has been certified by the court, as the risks to defendants in continuing litigation are higher after certification of a class. However, settlement also may be proposed by the parties prior to certification of a class. North Carolina Rule of Civil Procedure 23(c) requires court approval of all class action settlements. The first North Carolina appellate decision reviewing the standard for judicial approval of class action settlements was Ehrenhaus v. Baker, 717 S.E.2d 9 (N.C. Ct. App. 2011).

- North Carolina Rule of Civil Procedure 23(c) states: "A class action shall not be dismissed or compromised without the approval of the judge."
- Settlements are considered "compromises," therefore a class action cannot be settled unless subjected to judicial review and approval. <u>Ehrenhaus v. Baker</u>, 717 S.E.2d 9, 18 (N.C. Ct. App. 2011).
- The North Carolina judicial system prefers settlement over litigation, even in class actions. "But due
 to unique due process concerns implicated by binding a group of individuals not before the court, [the
 courts] are concerned with the circumstances and terms of class action settlements." Ehrenhaus, 717
 S.E.2d at 19.
- The court's review of proposed class action settlements is meant to: "(1) assure[] that any person whose rights would be affected by settlement has the opportunity to support or oppose it; (2) prevent[] private arrangements that may constitute "sweetheart deals" contrary to the best interests of the class; (3) protect[] the rights of those whose interests may not have been given due regard by the negotiating parties; and finally, (4) assure[] each member of the class that his or her integrity and right to express views and be heard on matters of vital personal interest has not been violated by others who have arrogated to themselves the power to speak and bind without consultation and consent." Ehrenhaus, 717 S.E.2d at 19 (citing E.D.N.Y. and Second Circuit federal cases) (citations omitted) (alterations in original).
- The North Carolina Court of Appeals adopted the procedure for review of class action settlements that is used by federal courts. "First, the trial court should conduct a preliminary approval or prenotification hearing to determine whether the proposed settlement is 'within the range of possible approval' or, in other words, whether there is 'probable cause' to notify the class of the proposed settlement. If the trial court grants preliminary approval, notice is sent to the class, [and] the court conducts a 'fairness' hearing, at which all interested parties are afforded an opportunity to be heard on the proposed settlement. At this second hearing, the trial court must ascertain whether the proposed settlement is fair, reasonable, and adequate." Ehrenhaus, 717 S.E.2d at 19 (citations and quotations omitted).
- "Proponents of class action settlements bear the burden of showing the settlement meets this standard." <u>Ehrenhaus</u>, 717 S.E.2d at 19 (citing Eleventh Circuit federal case).
- "Appellate courts review the decision to approve a settlement for abuse of discretion." Ehrenhaus, 717 S.E.2d at 19-20 (citing 7B Charles Alan Wright et al., Federal Practice & Procedure § 1797.1, at 80 (3d ed. 2005) and Ninth Circuit federal case).
- When assessing a proposed class action settlement, there are several factors the court should consider: (1) protection of the rights of passive and absent class members, (2) the possibility of collusion between the plaintiffs and defendants actively involved in the case, (3) the likelihood the

class will prevail in litigation, and the potential outcome from winning litigation versus the benefits to the class offered by the settlement, (4) the class's reaction to the settlement, (5) the plan for allocation and distribution of the settlement among class members, (6) whether proper notice was given to the absent class members, (7) whether a settlement would waive other claims, (8) the opinion of counsel, (9) the defendant's ability to pay, (10) the complexity and cost of further litigation, and (11) the stage of the proceedings and extent of discovery conducted. Ehrenhaus, 717 S.E.2d at 20 (citing various federal sources); In re Progress Energy S'holder Litig., 2011 NCBC 44, ¶ 38, 2011 NCBC LEXIS 45, *11, 19-20 (N.C. Super. Ct. Nov. 29, 2012).

- The class's reaction to the settlement is of paramount importance. <u>Ehrenhaus</u>, 717 S.E.2d at 20 (citing <u>Sala v. Nat'l R.R. Passenger Corp.</u>, 721 F. Supp. 80, 83 (E.D. Pa. 1989) ("[T]he reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy.")); see <u>also In re Progress Energy S'holder Litig.</u>, 2011 NCBC at ¶¶ 25, 42-44, 2011 NCBC LEXIS at *21-22 (stating "the nearly silent reaction of the Class here supports a finding that the Settlement is fair and reasonable" and overruling one class member's objection to settlement because "[t]he overwhelming approval of the Merger by PGN shareholders after being provided with such Disclosures is strong evidence that the Class was satisfied with the Proposed Transaction and did not need the disclosure [the objector wanted] to determine whether the Merger was in the best interest of PGN shareholders.").
- "Provided there has been adequate notice of the terms of a settlement, a dearth of objections may indicate a settlement is fair." <u>Ehrenhaus</u>, 717 S.E.2d at 31 (citing S.D.N.Y. federal case).
- "[T]he opinion of experienced and informed counsel is entitled to considerable weight provided counsel has undertaken a detailed assessment[] of the strengths and weaknesses of the claims asserted, the applicable damages, and the likelihood of recovery." In re Progress Energy S'holder Litig., 2011 NCBC at ¶ 45, 2011 NCBC LEXIS at *22 (citations and quotations omitted).
- When a settlement is proposed prior to the certification of a class, or simultaneously with a motion for class certification, the court must be "even more scrupulous than usual when examining the fairness of the proposed settlement." Ehrenhaus, 717 S.E.2d at 20 (citation and quotation omitted).

Award of Attorney's Fees for Class Counsel

At the conclusion of a class action, whether by settlement or full adjudication, the court undoubtedly will be presented with a proposal for an attorney's fee award for class counsel if the class is successful. This is an issue that may raise several objections, especially in cases where the class did not obtain monetary relief.

- The general rule in North Carolina is that attorney's fees cannot be recovered by a successful litigant unless it is expressly authorized by statute. <u>Ehrenhaus v. Baker</u>, 717 S.E.2d 9, 32 (N.C. Ct. App. 2011) (citing <u>Stillwell Enterprises</u>, Inc. v. Interstate Equipment Co., 300 N.C. 286, 289, 266 S.E.2d 812, 814-15 (1980)).
- The Common Fund Doctrine has been adopted in North Carolina as an exception to the general rule prohibiting attorney's fees in the absence of statutory authority:

[T]he rule is well established that a court of equity, or a court in the exercise of equitable jurisdiction, may in its discretion, and without statutory authorization, order an allowance for attorney fees to a litigant who at his own expense has maintained a successful suit for the preservation, protection, or increase of a common fund or of common property, or who has created at his own expense or brought into court a fund which others may share with him.

Horner v. Chamber of Commerce, 236 N.C. 96, 97-98, 72 S.E.2d 21, 22 (1952); see also Ehrenhaus, 717 S.E.2d at 32 (citing Horner); Hoke County Bd. of Educ. v. State, 198 N.C. App. 274, 281, 679 S.E.2d 512, 518 (2009) (citing Horner).

- The Common Fund Doctrine is appropriately applied "in cases (1) where the classes of persons benefitting from the lawsuit were small and easily identifiable, (2) where the benefits could be traced accurately, and (3) where the costs could be shifted to those benefitting with some precision." Hoke County Bd. Of Educ., 198 N.C. App. at 281-82, 679 S.E.2d at 518 (citing Bailey v. State of North Carolina, 348 N.C. 130, 161, 500 S.E.2d 54, 72 (1998), which cited Alyeska Pipeline Serv. v. Wilderness Soc., 421 U.S. 240, 264 n. 39, (1975)).
- In a class action, the common fund doctrine is applicable:

when each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf. Once the class representatives have established the defendant's liability and the total amount of damages, members of the class can obtain their share of the recovery simply by proving their individual claims against the judgment fund. . . . Although the full value of the benefit to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of his claim bears to the total recovery.

<u>Hoke Count Bd. Of Educ.</u>, 198 N.C. App. at 282, 679 S.E.2d at 518 (quoting <u>Boeing Co. v. Van Gemert</u>, 444 U.S. 472, 479, 100 S. Ct. 745, 62 L. Ed. 2d 676, 682 (1980)).

• The common fund doctrine cannot be used to shift the burden of attorney's fees "[i]f the benefit reaped by the representative plaintiffs merely 'vindicates a general social grievance,' or redounds to the benefit of the public at large...." Hoke Count Bd. Of Educ., 198 N.C. App. at 282, 679 S.E.2d at 518 (citing Bailey, 348 N.C. at 161, 500 S.E.2d at 72, which quoted Boeing Co, 444 U.S. at 479, 100 S. Ct. 745, 62 L. Ed. 2d at 682).

- Where a fund is obtained through class action litigation that "vindicate[s] a general social grievance, rather than [plaintiff's] individual complaints," the common fund doctrine is not applicable. Hoke Count Bd. Of Educ., 198 N.C. App. at 282, 679 S.E.2d at 518.
- North Carolina courts have rejected the "private attorney general doctrine," under which a few states allow attorney's fees as an incentive for the initiation of public interest litigation by a private party. Hoke Count Bd. Of Educ., 198 N.C. App. at 283, 679 S.E.2d at 519.
- North Carolina courts have rejected the "corporate benefit doctrine," under which "a litigant who
 confers a common monetary benefit upon an ascertainable stockholder class is entitled to an award
 of counsel fees and expenses for its efforts in creating the benefit," provided certain prerequisites are
 met. In re: Wachovia S'holder Litig., 168 N.C. App. 135, 140, 607 S.E.2d 48, 51-52 (2005)
- In class actions that <u>do not produce a "common fund,"</u> some states apply the "substantial benefit doctrine," "common benefit doctrine," or "corporate benefit doctrine" to award attorney's fees. However, North Carolina courts have explicitly rejected these doctrines. <u>Ehrenhaus</u>, 717 S.E.2d at 34-35 (citing <u>In re: Wachovia S'holder Litig.</u>, 168 N.C. App. 135, 140, 607 S.E.2d 48, 51 (2005); <u>In re: Wachovia S'holder Litig.</u>, 168 N.C. App. at 141-43, 607 S.E.2d at 51-53 (overruling trial court's decision to award attorney's fees under the corporate benefit doctrine because NC rejects the doctrine and there was no monetary benefit conferred on the class by plaintiff's actions).
- If the parties agree, as part of a class action settlement, that defendants will pay a portion or all of plaintiff's attorney's fees, the court must make a determination of whether the proposed fee award is reasonable. Ehrenhaus, 717 S.E.2d at 33-35 ("While any 'compromise' in a class action must be reviewed by a court, a court cannot modify a purely contractual settlement."); In re Progress Energy S'holder Litig., 2011 NCBC 44, ¶ 53, 2011 NCBC LEXIS 45, *24-25 (N.C. Super. Ct. Nov. 29, 2011)("Despite the contractual agreement between the parties regarding Plaintiff attorneys' fees, the relevant inquiry before the court is whether the Proposed Fee Award is reasonable under the Ehrenhaus analysis.")
- "The reasonableness of attorney's fees in this state is governed by the factors found in Rule 1.5 of the Revised Rules of Professional Conduct of the North Carolina State Bar." The trial court must examine evidence to make appropriate findings of fact and conclusions of law regarding the reasonableness of a proposed fee award based on the factors set forth in N.C. Rev. R. Prof. Conduct 1.5. And the court must provide a reasoned decision on the issue of how it arrived at the figure to be awarded. Ehrenhaus, 717 S.E.2d at 33, 35.
- The N.C. Rev. R. Prof. Conduct 1.5 provides:
 - (a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:
 - (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services:
 - (4) the amount involved and the results obtained:
 - (5) the time limitations imposed by the client or by the circumstances;

- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.
- (b) When the lawyer has not regularly represented the client, the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.
- (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
- (d) A lawyer shall not enter into an arrangement for, charge, or collect:
 - (1) a contingent fee for representing a defendant in a criminal case; however, a lawyer may charge and collect a contingent fee for representation in a criminal or civil asset forfeiture proceeding if not otherwise prohibited by law; or
 - (2) a contingent fee in a civil case in which such a fee is prohibited by law.
- (e) A division of a fee between lawyers who are not in the same firm may be made only if:
 - (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
 - (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
 - (3) the total fee is reasonable.
- (f) Any lawyer having a dispute with a client regarding a fee for legal services must:
 - (1) make reasonable efforts to advise his or her client of the existence of the North Carolina State Bar's program of fee dispute resolution at least 30 days prior to initiating legal proceedings to collect the disputed fee; and
 - (2) participate in good faith in the fee dispute resolution process if the client submits a proper request.
- The <u>Ehrenhaus</u> decision, which held that "[t]he reasonableness of attorney's fees in this state is governed by the factors found in Rule 1.5 of the Revised Rules of Professional Conduct of the North Carolina State Bar," was a class action case in which there was no common fund (the shareholders settled for additional disclosures related to a merger).
- Prior to <u>Ehrenhaus</u>, the North Carolina Business Court noted that "no North Carolina appellate court has articulated standards governing the award of attorney's fees in a common-fund class action," and adopted the following methodology for determining the amount to award from a common fund:

Following [Byers v. Carpenter, 1998 NCBC 1, 1998 NCBC LEXIS 3 (January 30, 1998)], and in reliance on the substantial federal case law in this area, the Court concludes that the principle basis upon which to determine a reasonable attorney's

fees is the percentage-of-recovery method, using the "lodestar" method as a cross-check, and evaluating the amount requested in light of all the relevant factors in the particular case.

A common benchmark percentage is 25%, which courts adjust upwards or downwards depending on the size of the recovery, the size of the class and other factors. Usually, 50% is the upper limit on a reasonable fee award from a common fund.

<u>Carl v. State</u>, No. 06 CVS 13617, 2009 NCBC LEXIS 36, ¶¶ 82-83 (N.C. Super. Ct. Dec. 15, 2009) (citations omitted).

• The additional factors considered by the Business Court in <u>Carl</u>, include: (1) the value of the Settlement and the number of persons benefitted, (2) the absence of objectors (3) whether Class Counsel demonstrated skill and efficiency in achieving the Settlement, (4) the complexity and duration of the litigation, (5) the amount of time Class Counsel spent on the case, (6) the risk of nonpayment, (7) whether the percentage requested is consistent with awards in similar cases, and (8) whether Class Counsel's expenses are fair and reasonable, and all relate to the prosecution of the litigation. <u>Carl</u>, 2009 NCBC LEXIS at ¶¶ 87-94.

Recent Federal Decisions Impacting North Carolina Class Actions

Class action law is rapidly developing at the federal level, with several issues that affect state class actions having reached the U.S. Supreme Court in the last couple of years. Two areas of particular interest are (1) the enforceability of class arbitration waivers in arbitration contracts and (2) the requirements for obtaining federal jurisdiction over state class actions provided under The Class Action Fairness Act of 2005.

The Enforceability of Class Arbitration Waivers

There is a tension between the Federal Arbitration Act ("FAA"), which reflects a strong federal policy favoring arbitration, and state laws which make the validity of arbitration agreements contingent upon the availability of class procedures or which categorically prohibit the arbitration of certain types of claims. Recent developments in this area regarding the preemptive power of the FAA over state laws regarding class arbitration waivers may impact North Carolina precedent.

- The U.S. Supreme Court recently validated the enforceability of class arbitration waivers in <u>AT&T Mobility v. Concepcion</u>, 131 S.Ct. 1740 (2011). The U.S. Supreme Court held that California's <u>Discover Bank</u> rule, under which class arbitration waivers were deemed unconscionable and unenforceable, was preempted by the FAA. <u>Concepcion</u>, 131 S.Ct. at 1753.
- Although there is a federal policy favoring arbitration, the U.S. Supreme Court and federal Circuit Courts have established that agreements to arbitrate statutory claims may be unenforceable if the terms of the agreement prevent the plaintiff from effectively vindicating his statutory rights. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000); Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 636-37 (1985); In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 288–89 (4th Cir. 2007).
- This vindication of rights principle has been recognized as applying to ensure a plaintiff's ability to
 enforce a substantive statutory right based on <u>Mitsubishi</u>, 473 U.S. at 628, 636-37, and *potentially* to
 invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive
 based on <u>Green Tree</u>, 531 U.S. at 90-92.
- Since <u>Concepcion</u>, courts have pushed to explore whether the vindication of rights doctrine is affected by <u>Concepcion</u>, whether the doctrine is limited to federal claims, and whether the doctrine, as explained by the U.S. Supreme Court in <u>Green Tree</u>, can be used to invalidate arbitration agreements with class arbitration waivers due to the costs of arbitration.
- The U.S. Supreme Court is currently considering <u>American Express Co.</u>, et al. v. Italian <u>Colors Restaurant</u>, et al., (S.Ct. No. 12-133) a federal antitrust class action in which the Second Circuit Court of Appeals held that a class arbitration waiver was unenforceable because "the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." <u>In re American Express Merchants' Litigation</u>, 634 F.3d 187, 197-98 (2d Cir. 2011). The Second Circuit relied upon <u>Green Tree</u> in reaching its conclusion.
- The U.S. Supreme Court in <u>Concepcion</u> seems to reject the same argument advanced by the Second Circuit in <u>Amex</u>: "The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." <u>Concepcion</u>,131 S.Ct. at 1753 (citation omitted).

- The Second Circuit, however, and other courts have urged that <u>Concepcion</u>'s holding is limited to cases in which state law is at issue, not federal law. The U.S. Supreme Court's ruling in <u>Amex</u> may answer this question, as well as whether the vindication of rights doctrine set forth in <u>Green Tree</u> is a viable ground to invalidate a class arbitration waiver.
- The Fourth Circuit Court of Appeals in Muriithi v. Shuttle Express, Inc., 712 F.3d 173 (4th Cir. 2013) addressed both the Concepcion decision and the viability of the vindication of rights doctrine set forth in Green Tree. In the Fourth Circuit's view, like the Second Circuit's, the vindication of rights doctrine as set forth in Green Tree survived Concepcion intact. However, the Fourth Circuit seems to disagree with the Second Circuit regarding the limitations on Concepcion's reach. The Fourth Circuit explicitly read Concepcion as having a broader application than just to state laws and applied Concepcion to validate the class arbitration waiver in the face of federal FLSA claims.
- Other courts have questioned the applicability of the vindication of rights doctrine to state law claims.
- The North Carolina Supreme Court addressed the enforceability of class arbitration waivers in <u>Tillman v. Commercial Credit Loans, Inc.</u>, 362 N.C. 93, 655 S.E.2d 362 (2008), prior to <u>Concepcion</u> and relied upon the vindication of rights doctrine set forth in Green Tree to invalidate an arbitration clause.
- The North Carolina Supreme Court found an arbitration clause to be substantively unconscionable, in part, because it prohibited the joinder of claims and class actions. Recognizing that the class arbitration waiver may be insufficient alone to invalidate the arbitration agreement, the court found that it nonetheless contributed to the unconscionability of agreement. Tillman, 362 N.C. at 107-08, 655 S.E.2d at 373.
- The class arbitration waiver contributed to substantive unconscionability because it added to "the financial inaccessibility of the arbitral forum as established by this arbitration clause because it deters potential plaintiffs from bringing and attorneys from taking cases with low damage amounts in the face of large costs that cannot be shared with other plaintiffs," and "the one-sidedness of the clause because the right to join claims and pursue class actions would benefit only borrowers." Tillman, 362 N.C. at 107-08, 655 S.E.2d at 373.
- Relying on <u>Green Tree</u>, the North Carolina Supreme Court ruled that the arbitration clause was substantively unconscionable because "(1) the arbitration costs borrowers may face are prohibitively high; (2) the arbitration clause is excessively one-sided and lacks mutuality; and (3) the clause prohibits joinder of claims and class actions," which "taken together, render it substantively unconscionable because the provisions do not provide plaintiffs with a forum in which they can effectively vindicate their rights." <u>Tillman</u>, 362 N.C. at 104, 108, 655 S.E.2d at 370-71, 373 (citing <u>Green Tree</u>, 531 U.S. at 90).
- Post-<u>Concepcion</u>, the analysis regarding the enforceability of class arbitration waivers in North Carolina may be affected. The U.S. Supreme Court's anticipated decision in <u>Amex</u>, also may have an impact the viability of <u>Tillman</u>.

Federal Jurisdiction Under The Class Action Fairness Act of 2005

The U.S. Congress passed The Class Action Fairness Act of 2005 ("CAFA"), in part, to rectify abuses of the class action process by State and local courts, including demonstrated biases against out-of-state defendants. See 190 P.L. 2, § 2(a)(4), (b). CAFA provides that a defendant may remove a state class action case to federal court if there is minimal diversity among the parties, 100 or more plaintiffs in the class, and the matter in controversy exceeds \$5,000,000, exclusive of interest and costs. Class action plaintiffs are testing the boundaries of federal jurisdiction under CAFA, and the U.S. Supreme Court

issued its first decision regarding CAFA this year in <u>Standard Fire Insurance Co. v. Knowles</u>, 133 S.Ct. 1345 (2013).

- Knowles presented questions about the power of class action plaintiffs to legally bind class members
 prior to class certification and whether class action plaintiffs can avoid federal jurisdiction under CAFA
 by stipulating with the complaint that the class will not seek damages in excess of the \$5 million
 CAFA threshold, even though actual damages could be shown to exceed \$5 million.
- The U.S. Supreme Court acknowledged the potential to use these types of stipulations to artificially break up large class actions of national importance into many smaller class actions just to avoid federal jurisdiction: "It would also have the effect of allowing the subdivision of a \$100 million action into 21 just-below-\$5-million state-court actions simply by including nonbinding stipulations; such an outcome would squarely conflict with the statute's objective." Knowles, 133 S. Ct. at 1350.
- The U.S. Supreme Court held that class action plaintiffs cannot use such stipulations to manipulate the amount in controversy and avoid jurisdiction under CAFA, because they lack the authority to bind absent class members prior to class certification. Knowles, 133 S. Ct. at 1349-50.
- The plaintiff's stipulation could not reduce the value of damages of the proposed class because, as
 established by <u>Smith v. Bayer Corp.</u>, 564 U. S. ____ (2011), a plaintiff cannot legally bind members of
 a proposed class before the class is certified. Knowles, 133 S. Ct. at 1348-49.

Recent North Carolina Class Action Decisions

Below is a summary of several recent class action decisions issued by the North Carolina Appellate Courts and the North Carolina Business Court. While Business Court decisions are not binding, they are persuasive authority and written opinions are required in all complex business cases on final disposition pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure. Many opinions by the Business Court are also issued after resolution of dispositive motions or novel non-dispositive motions. The purpose of the written opinion is to create persuasive legal authority that will assist businesses operating in North Carolina predict how their cases might turn out if designated as a complex business case.

• Beroth Oil Co. v. NC DOT, N.C. Supreme Court Case No. 390PA11-2

<u>Summary</u>: See immediately below for a more fulsome discussion of this case. On appeal, the Appellants' sole contention is that the trial court and the North Carolina Court of Appeals erred in not certifying a class of plaintiffs, who were the owners of real property in an area in Forsyth County that was designated for highway construction. Appellee responds that the trial court and the North Carolina Court of Appeals correctly concluded that class certification is improper in inverse condemnation claims because an individualized factual analysis is required for each underlying claim. Briefing has been completed, and no date for oral argument has been scheduled.

Beroth Oil Co. v. NC DOT, 725 S.E.2d 651 (N.C. Ct. App. 2012), appeal dismissed by, review granted by Beroth Oil Co. v. N.C. DOT, 2013 N.C. LEXIS 205 (N.C. Mar. 7, 2013)

<u>Summary</u>: Plaintiffs were the owners of real property located in an area in Forsyth County which was designated by the General Assembly for highway construction. Plaintiffs filed a complaint in Forsyth County Superior Court asserting the following claims for relief against the North Carolina Department of Transportation: inverse condemnation, a taking in violation of the Fifth Amendment to the U.S. Constitution, a violation of the Plaintiffs' rights under the equal protection clause of the Fourteenth Amendment to the U.S. Constitution, a taking in violation of Article I, Section 19 of the North Carolina Constitution, and declaratory relief. The Plaintiffs subsequently moved for certification of a proposed class of approximately 800 members who would be affected by the proposed beltway construction.

The trial court dismissed all but Plaintiffs' inverse condemnation claim and their declaratory judgment action. The trial court later denied Plaintiffs' motion for class certification, finding that the question of whether a taking had occurred with respect to each of the affected properties predominated over questions of law and fact common to all members of the proposed class. The court further concluded that – even if Plaintiffs had established a class – the class action mechanism was not the superior method of adjudicating the claims at issue because the matter of whether a taking had occurred needed to be determined on a property by property basis and none of the savings and expediencies that a class action offers would be realized.

<u>Holding</u>: Restating the "well-known principle that land is unique," the N.C. Court of Appeals found that the inverse condemnation test could not be applied to the class in a general manner, because myriad individualized evidentiary factors needed to be assessed to determine whether a taking occurred with respect to each parcel of land.

A trial on the merits will require separate inquiries into each property owner's use and expectations regarding his or her property. The court below relied upon this truth in determining that individual factual issues predominate and, accordingly, Plaintiffs had failed to establish a class. It was Plaintiffs' burden to introduce an effective methodology for bringing their claims together as a class. Within its discretion, the trial court concluded that Plaintiffs failed to meet this burden, and that Plaintiffs' inverse condemnation claim was not manageable as a class action. Because we

discern no abuse of discretion in the trial court's determinations underlying its decision to deny Plaintiffs' motion for class certification, we must defer to the trial court's ruling.

725 S.E.2d at 665.

Having held that the trial court did not err in concluding that Plaintiffs failed to establish the existence of a class, the court nevertheless reached the question of whether the class action mechanism would be the superior method for adjudicating the matter, even though it did not need to: "Although unnecessary to our holding, we believe utilization of the class action mechanism here would not serve the best interests of the prospective class members, for both practical and equitable reasons." <u>Id.</u> 666.

<u>Lee v. Coastal Agrobusiness</u>, 2012 NCBC 49, 2012 NCBC LEXIS 51 (N.C. Super. Ct. Sept. 27, 2012)

<u>Summary</u>: Farmer plaintiffs alleged that defendants' defective inoculant, applied to peanut seeds for the purpose of enhancing the growth and development of the peanut plant, harmed their peanut crop. They sought certification of a class of all buyers of the product, except those who separately settled with defendants. The proposed class contained sixty-seven customers who purchased the inoculation during the 2008 peanut season. Defendants opposed the motion for class certification, arguing that Plaintiffs had not adequately demonstrated that class members other than Plaintiffs had inadequate crop yields during the 2008 peanut season or suffered any other losses as a result of using the inoculant.

<u>Holding</u>: The Superior Court denied Plaintiffs' motion for class certification, finding that Plaintiffs had not produced any competent evidence suggesting the existence of a class. There was no indication before the court that any of the proposed class members, other than the named plaintiffs, had experienced problems related to their use of the inoculant or even had any claim against the defendants. The court found that the only commonality among the proposed class members was the purchase of the inoculant. The court further found that – in any event – the court would have to make substantial factual determinations as to each individual class member to award appropriate relief; these individual factual issues would predominate over common questions of law or fact and would make a class action unwieldy.

The court emphasized the distinction between a plaintiff's burden of demonstrating the existence of a class at the pleading stage and the same burden following discovery and a hearing on class certification. Given that there had been ample opportunities for discovery and a hearing on class certification, the court required the plaintiffs to establish the actual existence of a class and found it insufficient merely to allege the existence of a class.

• In re PPDI Litig., 2012 NCBC 31, 2012 NCBC LEXIS 33 (N.C. Super. Ct. May 24, 2012)

<u>Summary</u>: Various groups of shareholders of Pharmaceutical Product Development, Inc. (PPDI) filed suit objecting to the terms of a merger between PPDI and another company. Each group of shareholders filing suit sought to represent other shareholders similarly situated. The litigation settled, and the court entered an order and final judgment finding the requirements for class action certification and class action settlements to have been satisfied.

Blitz v Agean, Inc., 2012 NCBC 20, 2012 NCBC LEXIS 21 (N.C. Super. Ct. Apr. 11, 2012)

<u>Summary</u>: Plaintiff received unsolicited faxes from defendant's restaurant and claimed a violation of the Federal Telephone Consumer Protection Act (TCPA), 47 U.S.C.S. § 227. Plaintiff sought

certification of a class defined as the holders of the telephone numbers contained in a database to whom the restaurant allegedly faxed thousands of unsolicited advertisements. The class definition did not exclude individuals who had consented to receive communications from the defendant. Nor did defendant know with certainty whether all numbers on the list were obtained from one database source or through mixing customers from multiple lists. The court found that the claimant did not meet the requirements for class certification under N.C. R. Civ. P. 23(a) because common questions would not predominate over individual issues and certification also was unjust on equitable grounds.

<u>Holding</u>: Class certification is denied because plaintiff failed to provide a theory of generalized proof as to whether individual plaintiffs consented to receive defendant's faxes, therefore common questions do not predominate over individual inquiries and a class does not exist. Additionally, certification would be unjust on equitable grounds because it would primarily serve to give the sole plaintiff to come forward inappropriate leverage in settlement negotiations.

The court reasoned that "when considering whether questions common to the class will predominate the court may consider how a trial on the merits would be conducted if a class were certified." 2012 NCBC at ¶ 30, 2012 NCBC LEXIS at *10 (citation and quotations omitted). This evaluation of "how a trial would proceed entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class, a process that ultimately prevents the class from degenerating into a series of individual trials. Id. (citation omitted.) The court further reasoned that "a court's attempt at preventing a class action from degenerating into a series of individual trials also requires it to determine whether it is likely that the answers to those common questions will be consistent among class members. A common question is not enough when the *answer* may vary with each class member and is determinative of whether the member is properly part of the class." 2012 NCBC at ¶ 30, 2012 NCBC LEXIS at *10-11 (citations and quotations omitted).

The court held that "the predominance of individual issues necessary to decide an affirmative defense may preclude class certification." 2012 NCBC at ¶ 31, 2012 NCBC LEXIS at *12 (citation and quotation omitted). In this case, there was no common source from which the Court could determine whether all members of the class had consented to receive faxes from defendant. Plaintiff would have to prove "whether Defendant . . . obtain[ed] express invitation or permission for each number," which would require individual mini-trials into each of the 900+ telephone numbers on the list. The focus of the case would be "individual questions of whether each class member consented rather than any common questions the class might share." 2012 NCBC at ¶ 36, 2012 NCBC LEXIS at *17. Additionally, the court noted that "[a]mong the potential drawbacks the trial court may consider in its discretion are matters of equity," including the fact that "class actions can be used to put greater financial pressure on defendants to settle with the individual plaintiff." 2012 NCBC at ¶ 24, 2012 NCBC LEXIS at *7 (citation and quotations omitted). In this case, the plaintiff was the only person who received faxes to come forward and his recovery was at most \$2500. The court reasoned that "the significance of this lawsuit to Plaintiff rests primarily on its settlement value" if a class were to be certified, and "equity does not condone using the class action procedure simply for leverage in settlement." 2012 NCBC at ¶ 38, 2012 NCBC LEXIS at *18-19 (citation omitted). Accordingly, the court held that class certification would be inappropriate on equitable grounds, even if the prerequisites for certification had been met.

• Ehrenhaus v. Baker, 717 S.E.2d 9 (N.C. Ct. App. 2011)

<u>Summary</u>: A representative filed a class action, on behalf of a class consisting of all shareholders of Wachovia common stock, challenging the merger of Wachovia with Wells Fargo. After the merger was announced, Ehrenhaus filed the class action law suit, challenging the merger and seeking injunctive relief. The parties subsequently entered into a settlement resolving the class claims, which the trial court approved. The appellants were dissatisfied with the merger, and argued that the trial court failed to properly examine the qualifications and adequacy of the class representative and his

counsel, and that the Wachovia shareholders were wrongfully denied the right to opt out of the class and pursue their own causes of action.

<u>Holding</u>: As to the appellants' first point, the Court of Appeals rejected the argument that Ehrenhaus was an inadequate class representative, finding that his ownership of over 1000 shares of Wachovia stock, although small compared to the number of outstanding shares, was no bar to him adequately serving as a class representative.

The Court next summarily rejected appellants' argument that class counsel was inadequate by virtue of a purported conflict of interest stemming from his contingency fee arrangement.

As for appellant's argument that the trial court's certification of a non-opt-out class failed to meet the procedural guarantees of the federal Due Process Clause, the Court reviewed the federal case law and determined that the appellants' issue with the preclusion of potential claims for damages against the Wachovia Board were unfounded because those claims had not been articulated before the trial court. The Court found that the predominant claim was the attempt to enjoin the merger, and that the appellants failed to explain to the trial court what causes of action they wished to bring and how the nature of those claims might impact the due process analysis. The Court thus held that the trial court correctly determined that due process did not require opt-out rights in this case.

Brown v. NC Dep't of Env't & Nat. Res., 714 S.E.2d 154 (N.C. Ct App. 2011)

<u>Summary</u>: Plaintiffs state foresters, on behalf of themselves and a proposed class of "professional employees", sued the N.C. Department of Environment and Natural Resources alleging violations of state and federal wage and hour laws. The trial court dismissed the claim on sovereign immunity grounds.

<u>Holding</u>: The Court held that the state waived its sovereign immunity by conferring rights to overtime compensation on the foresters under the relevant statute, and the foresters were exempt professionals entitled to overtime compensation. The Court did not address any issues uniquely related to class actions.

Hamilton v. Mortgage Services, 711 S.E.2d 185 (N.C. Ct. App. 2011)

<u>Summary</u>: Plaintiff alleged that the charging of certain fees associated with her home loan, and the loans of many other North Carolina borrowers, constituted an unfair and deceptive trade practice which was actionable under N.C. Gen. Stat. § 75-1.1 as a class action. The trial court issued an order that partially granted defendants' motions to dismiss and partially denied plaintiff's motion for class certification. The trial court partially granted class certification with respect to certain issues. Plaintiff immediately appealed the trial court's order. The Court of Appeals dismissed the plaintiff's appeal for lack of jurisdiction.

<u>Holding</u>: There is no right to an interlocutory appeal of an order that partially denies and partially grants class certification, as the partial denial of class certification does not affect a substantial right to the same extent as a complete denial.

The court reasoned that while an interlocutory order denying a request for class certification generally is immediately appealable because it affects a substantial right, "each interlocutory order must be analyzed to determine whether a substantial right is jeopardized by delaying the appeal." Plaintiff could not cite any case precedent holding that an order partially denying class certification affected a substantial right, while defendants pointed out that the cases allowing interlocutory review of certification decisions had done so when the trial court denied class certification completely. The court believed that:

In cases, such as this one, in which a request for class certification is partially granted, a class is defined and certain issues are designated for consideration on a class-wide basis. In light of the fact that an order, such as that at issue here, does involve a refusal to certify certain issues for consideration in the context of a class action, the class representative may, after final judgment, seek appellate review of that portion of the trial court's order refusing class certification on behalf of the proposed class. Based upon these considerations, we believe that an order partially denying class certification does not affect a substantial right to the same extent and in the same manner that an order refusing to certify any issue for consideration on a class-wide basis does.

711 S.E.2d at 193-94.

In re Progress Energy S'holders Litig., 2011 NCBC 44, 2011 NCBC LEXIS 45 (N.C. Super. Ct. Nov. 29, 2011)

<u>Summary</u>: In connection with the proposed merger of Progress Energy, Inc. ("PGN") and a subsidiary of Duke Energy Corp. ("Duke"), plaintiffs filed putative class actions that were consolidated, claiming the PGN Board breached its fiduciary duty in connection with a joint proxy statement filed by Duke on behalf of both companies, that Duke aided and abetted in the PGN Board's breach, and that the proxy was deficient in that it did not provide adequate disclosure to PGN shareholders in connection with whether to vote for or against the Proposed Transaction. The parties negotiated a proposed settlement, pursuant to which PGN and Duke provided additional disclosures requested by and negotiated by plaintiffs prior to the shareholder votes on the merger. The court preliminarily certified a non-opt-out class and approved the settlement. After considering the few objections raised, the court approved the settlement, the award of attorney's fees that defendant agreed to pay plaintiff's counsel, and upheld the certification of the non-opt-out class.

<u>Holding</u>: As in other merger disputes, a non-opt-out class was appropriate because this is not a case where the parties seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments. Based on the framework for analyzing a class action settlement set forth in <u>Ehrenhaus v. Baker</u>, 717 S.E.2d 9 (N.C. Ct. App. 2011), the settlement is fair, reasonable, and adequate. As set forth in <u>Ehrenhaus</u>, the reasonableness of attorneys' fees in North Carolina is governed by Rule 1.5 of the Revised Rules of Professional Conduct of the North Carolina State Bar. Based on the factors set forth in Rule 1.5, the proposed fee award agreed to by the parties as part of the settlement agreement is reasonable.

The court considered the following factors to determine that the settlement was fair, reasonable, and adequate: "(a) the strength of the plaintiff's case, (b) the defendant's ability to pay, (c) the complexity and cost of further litigation, (d) the amount of opposition to the settlement, (e) class members' reaction to the proposed settlement, (f) counsel's opinion and (g) the stage of the proceedings and how much discovery has been completed." 2011 NCBC at ¶¶ 38-39, 2011 NCBC LEXIS at *19-20.

The court noted that a settlement agreement does not bind the court to award attorneys' fees to Plaintiffs' attorneys in any specific amount, but the arm's-length agreement between the parties does support a finding that a proposed fee award is reasonable. "Despite the contractual agreement between the parties regarding Plaintiff attorneys' fees, the relevant inquiry before the court is whether the Proposed Fee Award is reasonable under the Ehrenhaus analysis." 2011 NCBC at ¶¶ 51-53, 2011 NCBC LEXIS at *23-25.

• Blitz v. Agean, Inc., 197 N.C. App. 296, 677 S.E.2d 1 (2009)

Summary: This was the first North Carolina appellate decision to consider class certification in the context of Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, claims. Plaintiff received unsolicited faxes from defendant's restaurant and claimed a violation of the TCPA. The trial court denied class certification on the basis that issues concerning whether potential class members had an established business relations with the defendant, or whether they had given prior express permission or invitation to receive faxes from defendant were "predominating individualized issues militating against class certification." The appellate court held that the denial of class certification was an abuse of discretion because the trial court relied upon a misapprehension of the law.

<u>Holding</u>: In appeals from the grant or denial of class certification the appellate court reviews issues of law, such as statutory interpretation, *de novo*. Claims brought pursuant to the TCPA are not *per se* inappropriate for class actions. Decisions whether to certify TCPA claims for class actions should be made on the basis of the particular facts presented and theories advanced, and the trial court has broad discretion in determining whether class certification is appropriate, . . . and is not limited to those prerequisites which have been expressly enunciated in either Rule 23 or in <u>Crow</u>. 197 N.C. App. at 311-12, 677 S.E.2d at 28-29 (citation and quotations omitted).

The court noted that the primary issue concerning class certification TCPA, "is whether, under the "commonality and typicality" prong of the test, individualized issues concerning whether sent fax advertisements were "unsolicited" predominate over issues of law and fact common to the proposed class members." 197 N.C. App. at 303, 677 S.E.2d at 11.

In the absence of any North Carolina cases regarding class certification of TCPA claims, the court looked to other jurisdictions which were split on the issue. Ultimately, the court held that TCPA claims are not *per se* precluded from class actions, but rather the appropriateness of class certification must be determined by the particular facts and theories presented. The court held "[b]ecause we hold North Carolina should follow a different line of opinions concerning class certification of TCPA cases, we hold that the trial court's ruling denying class certification was based upon a misapprehension of law, and thus constituted an abuse of discretion. Where a ruling is based upon a misapprehension of the applicable law, the cause will be remanded in order that the matter may be considered in its true legal light." 197 N.C. App. At 312, 677 S.E.2d at 29 (citation and quotations omitted).

Carl v. State, No. 06 CVS 13617, 2009 NCBC LEXIS 36 (N.C. Super. Ct. Dec. 15, 2009)

Summary: Plaintiffs were members of the State Health Plan who purchased long term care insurance through the third-party insurance carrier selected by the State Health Plan through a competitive bid process. Their premiums were to remain level based on their age of enrollment and to stay constant unless a change was justified by the claims experience and approved by the Department of Insurance. After the State Health Plan's initial five-year contract with the third-party insurance carrier, the State Health Plan chose not to renew the contract and selected a replacement insurance carrier. The replacement insurance carrier, however, raised premiums and did not offer comparable benefits so it could not be certified as substantially similar as the original carrier. To maintain their benefits, plaintiffs were required to purchase individual policies with the original carrier instead of moving with the group plan to the replacement carrier. Plaintiffs claimed that the State Health Plan and original insurance carrier breached their promises and contracts with respect to the raising of premiums and failure to move them as a group to replacement group coverage. After the court certified a class, the parties negotiated a proposed settlement valued at \$14 million - \$20 million. Plaintiff's counsel sought attorney's fees and expenses to be paid from the settlement fund, and named class representatives sought a \$5000 incentive payment. The trial court approved the settlement, the awards of attorneys' fees, and approved the class representative incentive payments.

<u>Holding</u>: The court found that the settlement was fair, adequate, and reasonable. The plaintiff's counsel was entitled to reasonable attorneys' fees and expenses under the common fund doctrine. In

the court's discretion, a \$5,000 incentive payment to the two class representatives was reasonable and fair based on their efforts and involvement with the case.

The court reasoned that the settlement, valued at \$14 million - \$20 million was "fair, adequate and reasonable based on analysis of the following factors: complexity, expense and likely duration of the litigation; reaction of the class to the Settlement; the stage of the proceedings and amount of discovery completed; risks of establishing liability; risks of establishing damages; risks of maintaining a class through trial; ability of the Defendants to withstand a greater settlement; the range of reasonableness of the settlement in light of the best possible recovery; and the range of reasonableness of the settlement in light of all the attendant risks of litigation." 2009 NCBC LEXIS at ¶ 63 (citing federal 3rd Circuit case). The settlement represented a "significant recovery for the Class, providing them with approximately 64% of the difference in their premiums through 2009 and limiting the amount of increases in the future. The Court finds that this Settlement is fair, reasonable and adequate." 2009 NCBC LEXIS at ¶ 74.

Noting that no North Carolina appellate court had "articulated standards governing the award of attorney's fees in a common-fund class action," the court analyzed the reasonableness of the requested fee award based on a previous Business Court decision and federal cases:

Following [Byers v. Carpenter, 1998 NCBC 1, 1998 NCBC LEXIS 3 (January 30, 1998)], and in reliance on the substantial federal case law in this area, the Court concludes that the principle basis upon which to determine a reasonable attorney's fees is the percentage-of-recovery method, using the "lodestar" method as a crosscheck, and evaluating the amount requested in light of all the relevant factors in the particular case.

A common benchmark percentage is 25%, which courts adjust upwards or downwards depending on the size of the recovery, the size of the class and other factors. Usually, 50% is the upper limit on a reasonable fee award from a common fund.

2009 NCBC LEXIS at ¶¶ 82-83 (citations omitted).

The additional factors considered by the Business Court include: (1) the value of the Settlement and the number of persons benefitted, (2) the absence of objectors (3) whether Class Counsel demonstrated skill and efficiency in achieving the Settlement, (4) the complexity and duration of the litigation, (5) the amount of time Class Counsel spent on the case, (6) the risk of nonpayment, (7) whether the percentage requested is consistent with awards in similar cases, and (8) whether Class Counsel's expenses are fair and reasonable, and all relate to the prosecution of the litigation. 2009 NCBC LEXIS at ¶¶ 87-94.

The court recognized that "[i]ncentive payments are regularly awarded to class representatives in recognition of their time, expense and risk undertaken to secure a benefit for the Class they represent." The decision to award an incentive is entirely within the discretion of the court, as there is no entitlement to such payments. 2009 NCBC LEXIS at ¶ 95.

• <u>Clark v. Alan Vester Auto</u>, 2009 NCBC 17, 2009 NCBC LEXIS 12 (N.C. Super. Ct. July 17, 2009)

<u>Summary</u>: Plaintiff automobile purchasers filed a class action against eight car dealer entities and two insurance companies, under the Motor Vehicle Dealers and Manufacturers Licensing Law, *N.C. Gen. Stat. § 20-285 et seq.*, and the Unfair and Deceptive Trade Practices Act, *N.C. Gen. Stat. § 75-1.1 et seq.*, based on claims that defendants falsified down payments on cars and manipulated the ultimate sales price of cars in order to obtain higher loan amounts and recoup the falsified down payments for their benefit. Defendants argued that that any prospective claims by potential plaintiffs are too disparate for class treatment and should be litigated individually. Defendants also argued that plaintiff

lacked standing to sue all of the dealer entities, except the one from which he purchased his vehicle. The trial court granted class certification and found that plaintiff either had standing or there was a sufficient juridical link between the car dealer entities to warrant holding them all as defendants in the class action.

<u>Holding</u>: Plaintiff has met the prerequisites for class certification, and there is a sufficient juridical link between the dealer entities to support a determination that this action should proceed as a class action against all the dealer entities.

The court reasoned that a class existed that warranted class certification. The numerosity and adequate representation requirements were met, the class action was a superior method, and the common issues of whether defendant falsified a cash down payment, the method of determining class member damages, and whether the false down payments were unfair and deceptive would predominate over individualized issues. Citing *Newberg on Class Actions*, but not North Carolina precedent, the court further noted in a "Caveat" regarding class certification:

In this action, the court concludes that occasional and inevitable individual issues, such as the potential discrete liability of a Vester Defendant as to a particular class member, or as to damages of various class members, are outweighed by the interests of efficiency, judicial economy and the ends of justice. However, the parties should bear in mind that it is the duty of the trial court to attempt a fair and reasonable balance of those potentially competing interests; and that it is within the inherent power and authority of the court -- indeed, is the duty of the court -- when appropriate, to reconsider, alter, amend or withdraw class rulings *sua sponte*. This court will undertake to discharge that duty as this action moves forward toward resolution.

2009 NCBC at ¶ 54, 2009 NCBC LEXIS at *28-29.

With respect to whether a class action against all eight dealer entities was appropriate, the court noted that several jurisdictions "have recognized an exception to the literal standing requirement in a class action where defendant members are related in what is characterized as a 'juridical link,' which in substance is defined as the existence of a legal relationship between two or more defendants in a way such that resolution of the disputed claims in a single civil action is preferable to numerous disparate, but similar actions." The court went on to explain that:

The "juridical-link doctrine" answers the question of whether two defendants are sufficiently linked so that a plaintiff with a cause of action against only one defendant can also sue the other defendant under the guise of class certification. The juridical-link doctrine is not relevant to the issue of standing, and is properly confined to an analysis of the prerequisites to class certification. A juridical link sufficient to confer standing generally must stem from an independent legal relationship. It must be some form of activity or association on the part of the defendants that warrants imposition of joint liability against the group even though the plaintiff may have dealt primarily with a single member. This link may be a conspiracy, partnership, joint enterprise, agreement, contract, or aiding and abetting which acts to standardize the factual underpinnings of the claims and to insure the assertion of defenses common to the class.

2009 NCBC at ¶ 47, 2009 NCBC LEXIS at *22 (citing 32B Am. Jur. 2d. § 1590 (2009)). The common ownership, management, accounting systems, inter-dealership loans, and other evidence supported the court's decision that, "notwithstanding traditional notions and requirements of standing," there was a sufficient juridical link between the all dealer entities to warrant a class action against all of the dealer entities. 2009 NCBC at ¶ 50, 2009 NCBC LEXIS at *26.