

Stop that. Do that.

Using class actions for injunctive relief

By J. Philip Kirchner

New Jersey litigators have a powerful device available to them that is particularly useful when representing multiple plaintiffs in certain types of commercial cases. Surprisingly, that device — use of the class action in cases seeking injunctive or declaratory relief — is infrequently used. Lawyers contemplating bringing cases seeking equitable relief under New Jersey law and involving multiple plaintiffs — especially consumer fraud, civil rights and product liability medical monitoring cases — should always consider bringing those cases as a class action under Rule 4:32-1(b)(2).



New Jersey Court Rule 4:32-1(b)(2), modeled after its federal counterpart, Fed.R.Civ.P. 23(b)(2), allows a court to certify a class action in cases in which:

The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Rule 4:32-1(b)(2).

The New Jersey class action rules, including Rule 4:32-1(b)(2), were adopted in 1969 following the 1966 amendment of Fed.R.Civ.P. 23. Though on the books for more than 35 years, there are very few reported cases construing or even

referring to R. 4:32-1(b)(2).

To maintain a class action under R. 4:32-1(b)(2), the class must first meet the general prerequisites for certification of a class action, which are described in R. 4:32-1(a). Like its federal counterpart, Fed. R. Civ. P. 23(a), R. 4:32-1(a) contains four general requirements that must be satisfied to maintain any class action, including a §(b)(2) class action. Those requirements are commonly referred to as

- 1) “numerosity” — the class is so numerous that joinder of all members is impracticable;

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- 2) “commonality” — there are questions of law and fact common to the class;
- 3) “typicality” — the claims or defenses of the class representatives are typical of the class; and
- 4) “adequacy of representation” — the class representatives will fairly and adequately protect the interests of the class.

See *Goasdone v. American Cyanamid Corp.*, 354 N.J. Super. 519, 527-28 (Law Div. 2002); see also *In re Cadillac V8-6-4 Class Action*, 93 N.J. 412 (1983).

Once the general class action requirements of R. 4:32-1(a) have been satisfied, the class must then demonstrate it satisfies the requirements of one of the three subsections of R. 4:32-1(b). In the case of a subsection (b)(2) class action, representatives of the class must demonstrate the party opposing the class has acted or refused to act in some way common to the class making injunctive or declaratory relief appropriate.

Cases brought under Rule 4:32-1(b)(2) and the parallel federal rule, Fed. R. Civ. P. 23(b)(2), have typically fallen into one of three categories: 1) civil rights cases, see, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411 (2003); *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 103 S.Ct. 3492 (1983); 2) cases seeking medical monitoring in products liability cases, see, e.g., *Arch v. The American Tobacco Co.*, 175 F.R.D. 469 (E.D. Pa. 1997); *Goasdone v. American Cyanamid Corp.*, 354 N.J. Super. 519 (Law Div. 2002); and 3) consumer cases; see, e.g., *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002); *Laufer v. The United States Life Insurance Co. in the State of New York*, 2005 WL1869211 (N.J. Super., Law Div. 2005).

Because New Jersey case law construing Rule 4:32-1 is so sparse, New Jersey courts typically look to case law construing the parallel federal rule to aid them in deciding whether to certify a class action, including classes seeking certification under section (b)(2). See, e.g., *Goasdone*, 354 N.J. Super. at 528.

Assuming the proposed class passes muster under Rule 4:32-1(a), courts have focused on two factors in their analysis of a proposed (b)(2) class. First, they assess the precise nature of the remedy sought to see if it is truly equitable in nature. “To sustain class certification under (b)(2), the plaintiff must be seeking injunctive relief; that is, the court’s equitable powers must be invoked.” *Goasdone*, 354 N.J. Super. at 531 (citing *Barnes v. The American Tobacco Co.*, 161 F.3d 127, 142 (3d Cir. 1998), cert. denied 526 U.S. 1114 (1999)). If the relief sought is entirely or predominately monetary damages or if the request for injunctive relief is incidental to a claim for monetary damages, class certification under (b)(2) will be denied.

In *Goasdone*, the court considered whether a claim for medical monitoring constituted a claim for injunctive relief so as to qualify for class certification under §(b)(2). Following a long line of federal court cases, the court contrasted one request — to have the defendant pay the plaintiff class a certain sum of money representing the cost of medical monitoring, which it concluded would *not* constitute injunctive relief, with another request — to establish a court supervised medical monitoring program which the court concluded *did* constitute a request for injunctive relief.

Similarly, a request to enjoin a defendant from engaging in violations of the New Jersey Consumer Fraud Act would qualify for class certification under §(b)(2), whereas a claim predominantly seeking monetary damages for past violations of the Act would not. See *Laufer v. The United States Life Insurance Co. in the State of New York*, 2005 WL1869211 (N.J. Super., Law Div. 2005).

Second, the class must also establish the defendant has acted or refused to act on grounds generally applicable to the class in order to certify a class under §(b)(2). This second test for §(b)(2) certification is commonly referred to as the “cohesiveness” requirement and has been regarded as the “vital core” of a (b)(2) class.

The cohesiveness test of §(b)(2) requires the claims of class members be at least consistent if not uniform. The test is similar to the “predominance” requirement for §(b)(3) claims, which requires common issues of law and fact predominate over individual issues. Courts examining potential (b)(2) classes have been careful to ensure the class is cohesive and that individual issues do not predominate over common ones because, unlike in a (b)(3) class, individual class members may not opt out of a (b)(2) class action. In *Goasdone*, the court declined to certify a (b)(2) class, despite determining the class was primarily seeking equitable relief, because it concluded a number of individual issues resulted in a lack of cohesiveness. Those individual issues included the significance and extent of exposure of each class member to defendant’s products, whether medical monitoring was reasonable and necessary for each class member, and, in light of the statute-of-limitations defense raised by the defendant, the timing of class members’ exposure to the harmful products.

Once certified, a §(b)(2) class is a powerful device for seeking injunctive or declaratory relief. Any equitable relief awarded against the defendant will apply equally to all members of the class, making it a very effective and efficient tool for ensuring compliance by the defendant with a particular law or regulation. It is difficult to understand why §(b)(2) classes are not utilized more frequently, particularly in consumer fraud, civil rights and product liability medical monitoring cases.

In fact, §(b)(2) class actions have two significant procedural advantages over §(b)(3) claims. First, once a §(b)(2) class has been certified, absent class members may not opt out of the class. This makes it much easier and less expensive for the attorney representing the class to manage the case, knowing all parties included within the definition of the class approved by the court are actually a part of the class and there are no other individual claims competing for the court’s and defendant’s attention and creating scheduling and other logistical difficulties. The (b)(2) class, unlike the typical (b)(3) class, truly can speak with one voice.

Second, because absent class members may not opt out of a section (b)(2) class, there is no requirement that — unlike a §(b)(3) class — notice of the class action be sent to absent class members. The notice requirement of Rule 4:32-2(b), applicable only to §(b)(3) claims, is typically the single biggest procedural impediment to class certification, as well as the largest out-of-pocket expense incurred by the class representatives and their counsel.

Attorneys contemplating bringing a case seeking equitable relief on behalf of multiple parties should always consider whether the case might warrant class action treatment. In addition, attorneys planning to bring a §(b)(3) class action for money damages should consider whether it is appropriate to join with it a claim for equitable relief and seek certification under §(b)(2). In performing that analysis, the attorney should consider whether the contemplated class can meet the Rule 4:32-1(a) requirements of numerosity, commonality, typicality, and adequacy of representation, along with the requirements of §(b)(2) that the claims are truly equitable in nature and sufficiently cohesive. If those factors are all present, then a §(b)(2) class should definitely be considered.